



ACQUISITION RESEARCH PROGRAM SPONSORED REPORT SERIES

Implications and Constraints of Fiscal Laws in Contingency Contracting

30 August 2013

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ACQUISITION RESEARCH PROGRAM
GRADUATE SCHOOL OF BUSINESS & PUBLIC POLICY
NAVAL POSTGRADUATE SCHOOL

ABSTRACT

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We would like to remember Marcia Larssen's parents: Patricia A. Brown, who was diagnosed with small intestine cancer during the completion of our project and who passed away on February 8, 2013; and Raymond D. Brown, who passed away on April 29, 2013. Her mother's perseverance and courage has been an inspiration to us. Her father was a hardworking man who was devoted to caring for his wife and family, which is a reminder to all of us to remember the important things in life. They will remain in our hearts.



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I. INTRODUCTION

The purpose of this chapter is to provide the reader with an overview of the layout of our report. In Section A, we identify the problem and purpose of our research. In Section B, we present the significance of researching the implications and constraints of fiscal law in contingency environments. In Section C, we provide the roadmap of our methodology and the organization of our report.

A. PROBLEM IDENTIFICATION AND PURPOSE

The Department of Defense (DoD) acquires goods, services, and construction to support military operations through contracting. This is a routine function within the DoD and is controlled by fiscal laws and contracting regulations. These laws originated in peacetime environments. The philosophy of fiscal law as stated in *United States v. MacCollom* (1976) says, “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” The U.S. government agencies and the military must comply with fiscal law statutes when fulfilling the needs of agencies and programs authorized by Congress. Government contracting officers, guided by Federal Acquisition Regulations (FAR), obligate authorized and appropriated funds. The contracting officers’ primary goal is to acquire the services and supplies needed by “the warfighter to support essential missions in response to a crisis, contingency, or declaration of war” (U.S. Defense Procurement and Acquisition Policy [DPAP], 2012, Chapter 2). Meeting the needs of the government through procurement of goods and services provides for the best value and best price and manages acquisition risks. Originally, designed fiscal laws and regulations apply in peacetime environments, processes, and systems. Wartime contracting brings unique funding challenges.

Not all contracting situations and environments occur in peacetime or are routine, however. When unforeseen events occur, the acquisition of goods, services, and construction requires the contracting professional to be responsive, innovative, and efficient in providing procurement solutions to support the contingency environment.



These environments include not only declarations of war but also defense of the nation against or recovering from nuclear, biological, chemical, or radiological attack as well as situations where the President issues an emergency declaration or major disaster declaration. Recent emergencies and major disasters have included operations in New Orleans in the aftermath of Hurricane Katrina and in New York after storm damage in 2012. The military has also supported disasters in other countries, such as the operation in support of Haiti after the January 2010 earthquake. Contingency operations generate the purchasing of basic life-support necessities such as water, food, billeting, ammunition, communication devices, and transportation.

When working in a contingency environment, acquisition teams are required to follow the same rules, regulations, and laws throughout the requirements generation and acquisition processes that they would follow to support any other military operation.

While defense military capabilities have made substantial strides in countering ongoing threats—for example, drone warfare and software integration into weapon systems—the laws and regulations for funding military operations in contingency environments have changed minimally. The Commission on Wartime Contracting (CWC) reported, “Fiscal concerns also complicate the success of ongoing and future contingency contracting” (CWC in Iraq and Afghanistan, 2011, p. 29). The Commission estimated that by the end of fiscal year (FY) 2011, hundreds of billions of dollars would be obligated under contingency contracts. Actual expenditures could be even higher than estimated because not all contracts that support contingency operations in Iraq and Afghanistan are identifiable as such (CWC, 2011, p. 22).

The risk of violating these rules increases in a contingency environment because of the high demands and requirements involved in contingency operations, including urgent needs in remote or disaster locations. It is a problem when contracting professionals are unable to meet the needs of the military in these intense situations. This study focuses on the intersection of (1) federal funding rules designed for a routine environment and (2) the task of citing those funds on contingency contracts to uncover the challenges placed on decision-makers in contingency environments.



As contracting professionals working in a command that supports contingency contracting missions, such as the Logistics Civil Augmentation Program (LOGCAP) and Reachback, we have recognized the challenges faced by decision-makers in the field associated with supporting the warfighter. LOGCAP is an initiative by the United States Army to pre-plan—during peacetime—for the use of civilian contractors to perform selected services in wartime and other contingencies to augment United States forces in support of DoD missions (“LOGCAP Camp,” 2013).

LOGCAP’s primary focus is to provide support to and improve the operational strength of U.S. Army forces. LOGCAP can also provide support to other U.S. military services, coalition and multinational forces, and other government and non-government agency components in support of joint, combined, coalition, and multinational operations. These operations include missions other than war, such as training, peacekeeping, or humanitarian assistance missions.

The Reachback contracting mission supports the U.S. Forces Southwest Asia to conduct larger complex contracting functions utilizing an experienced work force located in the continental United States (CONUS). These resources include the Financial Services Division, Contracting Policy, Property Expertise, and the Army Sustainment Command’s Counsel.

The Reachback division’s service and supply acquisitions focus on logistics, warehousing, transportation, stevedoring and related terminal logistics, base operations and security, intelligence, counterinsurgency, and telecommunications requirements.

Examples of problems we experienced that motivated this research include the following:

- Seemingly unlimited funding for contingencies through supplemental appropriations may have the unintended consequence of postponing and prioritizing program requirements. The supplemental budget may also obscure the full cost of contracting and create the illusion that contractors in the war zone are a free resource.
- Fiscal law constrains the efficiency of contingency contracting specifically associated with military construction (MILCON). Personnel in the field,



who are otherwise struggling to keep pace with the changing requirements under urgent conditions, are required to understand the definitions of MILCON and separate and track MILCON expenditures to avoid Antideficiency Act (ADA) violations.

- Fiscal law limits the use of certain funds for specific circumstances. Personnel in the field are required to thoroughly understand the requirements and properly cite the correct type of funds. Strong knowledge of the requirement is particularly evident when operation and maintenance (O&M) funding is for unspecified minor construction, and repairs and maintenance.
- In some instances, LOGCAP contracts apply funding incrementally based on historical burn rates as compared to forecasted needs. The use of burn rates makes the tracking and reporting of funds for the initial contract award, undefinitized change orders, and the calculation of fees on definitized task orders difficult.
- The lack of Other Procurement Army (OPA) funding forces contractors to lease equipment when buying would be more appropriate because the lease adds risk for possible loss or damage. Procurement fiscal law constraints dictate leasing and preclude potentially more efficient purchase options.

The purpose of this project is to identify and analyze the constraints that the existing fiscal laws and regulations place on the process of contracting for goods and services to support missions in contingency environments. The fiscal law constraints do influence missions. The study also attempts to determine whether there is a pattern to the fiscal law constraints and effects through the examination of contingency environment cases.

B. IMPORTANCE OF THE RESEARCH

This research is important to inform readers of substantial unintended consequences, which may include loss of position or advancements, incarceration, and/or monetary damages, in the contingency contracting process from a rigid set of regulations.



The large amounts of contracted dollars involved in contingency contracts are in the billions of dollars. The results of the research could support changes to fiscal laws that would minimize the burdens on contracting professionals, minimize the risk of violating rules, and, most importantly, improve support to warfighters.

C. METHODOLOGY AND ORGANIZATION OF THESIS

Chapter II is a literature review that begins with foundational concepts. In this chapter, we first cover the various types of contingency environments, since fiscal law may have different impacts in each type of environment. We cover the processes to obtain funding for a specific good or service and the basic fiscal law framework for the various types of funding. We also describe contingency contracting.

In Chapter III, we review government investigations relating to contingency contracting findings and recommendations to analyze the unique funding challenges of contingency contracting and fiscal law impacts.

In Chapter IV, we examine ADA cases related to contingency contracting or in a contingency environment reported to Congress through the Government Accountability Office (GAO) from 2007 through 2012. We also analyze specific scenarios of contingency contracting where there is a high potential for either a violation of fiscal law or a negative impact on the mission. The cases examined include the following:

- military construction and severable funding;
- temporary military construction;
- life, health, and safety funding;
- lease versus buy procurements; and
- LOGCAP work orders.

In analyzing the cases, we seek patterns among the types of fiscal law constraints and contingency environments in order to craft policy recommendations, which appear in Chapter V.



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II. LITERATURE REVIEW

In this chapter, we describe the terms used throughout this study so the reader has a clear understanding. We cover the concepts of contingencies, contracting, appropriations, basic fiscal law, and types of fund currently available.

A. CONTINGENCY

1. Definitions

The dictionary definition of *contingency* is an event that is “not certain to occur,” “something liable to happen as an adjunct to or result of else,” or something “happening by chance or unforeseen causes” (“Contingency,” n.d.). Business leaders and strategists try to prepare for contingencies or put in place another plan that may affect desired outcomes.

According to 10 U.S. Code (U.S.C.) § 101(13) (A), Organization and General Military Powers, Definitions, a *contingency operation* is a military operation formally designated by the Secretary of Defense in which members of the armed forces are engaged in military actions against enemy or opposing military forces. Subsection B also provides the President and Congress the authority to declare contingencies in response to war or natural disasters in which military personnel mobilize to provide assistance.

The government has put into place contingency operations should these unforeseen circumstances take place. The FAR 2.101 (2013) definition for *contingency operation* is as follows:

Contingency operation (10 U.S.C. 101(a)(13)) means a military operation that (1) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (2) results in a call or order to, or retention on, active duty of members of the united services under section 688, 1201(a), 21302, 12304, 12305, or 12406 of 10 U.S.C., chapter 15 of 10 U.S.C., or any other provision of law during a war or during a national emergency declared by the President or Congress.



The Office of the Under Secretary of Defense (OUSD, 2012) revised the definition to provide for treatment as a contingency operation when the Secretary of Defense activates reserves in response to a governor's request for federal assistance (. This revision has extended the contracting officers' authority to use the emergency acquisition authorities in specifically identified emergency areas provided in the FAR 18.2 (2013), in the Defense Federal Acquisition Regulation Supplement (DFARS) 218.2 (2012), and in the definition of *simplified acquisition threshold* at FAR 2.101 (2013).

Gansler's 2010 briefing defined the following:

- Immediate: goal is 120 days to field;
- Urgent: goal is fewer than 12 months to field;
- Rapid: goal is one to three years to field;
- Enduring: three or more years to field; and
- Contingency: immediate need filled in theater.

Different services also use different terminology for identification of these Urgent/Rapid needs (Gansler, 2010):

- Army—Operational Need Statement (ONS)
- AF and Navy—Urgent Operational Need Statement (UONS)
- United States Marine Corp (USMC)—Urgent Universal Need Statement (UUNS)
- Joint Urgent Operational Need Statement (JUONS)
- Combat Mission Need Statement, Special Operations Command (SOCOM)
- Immediate Warfare Need
- Integrated Priority List

Defining *contingency* and related terms is important when working in different types of contingency environments, whether war related or disaster related. The



establishment of the anticipated schedule for the effort can be difficult when defining the requirements and determination of the type of funds that are available. In this study, we review approaches taken when two branches attempt to work together to design a requirement, because identifying terms and funding can put undue stress on the requirement generators, and may result in delays and cancellation of the project.

2. Types

Contingency contracting consists of five main types of operations. Determining the type of contingency involved is important because the contingency type influences the maturity of the operational environment for which contracting support is used. The analysis of the operational environment's maturity is important in our research because the time constraints of fiscal laws in the contingency environment involve the use of O&M funding over long periods of time (DPAP, 2012).

A sophisticated infrastructure capable of supporting and sustaining operations for extensive periods is a mature environment. A mature environment can have all or a combination of the following characteristics: legal framework, host-nation agreements, financial networks to support complex transactions, vigorous transportation systems, business capacity, capability, and a willingness to interact (DPAP, 2012).

A mature environment has the ability to adapt quickly to changing requirements and priorities. It often consists of vendors and suppliers that have prior contracting experience with the U.S. government and that can comply with FAR requirements.

An immature contracting environment is one that lacks the support infrastructure detailed previously. Few, if any, vendors may be available with which to conduct business, and they likely have had no previous experience working with the U.S. government (Barbaris & Callanan, 2008).

a. Major Theater War

In a major theater war, hostilities are ongoing, imminent, or likely, and involve a substantial commitment of United States military forces. Entire military force structures engage in conflicts with a specific geographic area (for example, Operation Enduring Freedom in Afghanistan).



b. Smaller Scale Contingencies

Similar to a major theater war, a smaller scale contingency operation is generally held in a specific area of operation, but the threat is less compelling, resulting in a smaller number of United States forces and a restricted time schedule (for example, Operation Just Cause in Panama).

c. Military Operations Other Than War

Military operations other than war (MOOTW) focus on the prevention of war, including conflict resolution, promotion of peace, and supporting civil or domestic crises. U.S. force support can involve combat and noncombat operations. A recent military deployment as a MOOTW is the 2011 military intervention in Libya whereby the United Nations authorized no-fly-zone enforcement in defense of rebel factions in Libya.

d. Domestic Disaster and Emergency Relief Operations

Domestic disaster and emergency relief operations focus on natural disasters such as hurricanes, weather storms, earthquakes, and floods and are supported by U.S. military forces providing cleanup and humanitarian assistance (for example, after Hurricanes Hugo, Andrew, Katrina, and, most recently, in the northeastern U.S., Hurricane Sandy). These operations also include man-made disasters resulting from oil spills and riots, and from air, rail, or highway accidents. (For example, the Coast Guard supported the British Petroleum [BP] Deepwater Horizon oil spill of 2010.) The United States has been instrumental in supporting domestic disaster and emergency relief operations both in CONUS and Outside of the Contiguous United States (OCONUS), providing cleanup and humanitarian assistance.

e. Military Exercises

Military exercises prepare the military for contingency, including the “sense of urgency, pressure, or risk to life or national interest” (DPAP, 2012). These exercises do not receive special consideration for forms of relief with specific contract actions or funding, as they do not qualify as declared contingencies or as a major



contingency type. Examples of military exercises include Joint Dawn, Key Resolve, and the National Training Center rotation (DPAP, 2012).

3. Phases

While no two contingency contracting operations are exactly alike, they fall into one or more of the four typical phases of a contingency operation (Air Force Logistics Management Agency [AFLMA], 2008):

- Phase I–Mobilization/Initial Deployment
- Phase II–Buildup
- Phase III–Sustainment
- Phase IV–Termination/Redeployment

It is important for contingency contracting officers (CCOs) to understand in what phase of a contingency an operation falls, because this classification can assist them in assessing their resources and preparing for the requirements needed to fulfill mission support. Not all operations follow the particular sequence detailed as follows. The operational theater can be in a hybrid phase based on various factors, including, but not limited to, operational environment, mission adjustments, and personnel surges.

a. Phase I: Mobilization/Initial Deployment

The first phase of a contingency operation occurs in the first 30–45 days of a mission. A CCO may perform different roles in rapid sequence, such as initial requestor, approving official, certifying officer, lodging officer, logistics coordinator, transportation officer, inspector, supply/inventory manager, and property administrator, among other things. The need to award contracts quickly upon arrival is usually imperative to the mission. The highest priority for contracting professionals during this stage is to be responsive to providing basic life-support requirements, security services, and support for the arrival of the initial ground troops. These items can include food, water, shelter, utilities, transportation, fuel, sanitation, interpreters, and guides.



b. Phase II: Buildup

The buildup phase of a contingency operation, normally day 45 and forward, is generally a continuation of the initial deployment phase. Troops and contracting personnel supporting the mission deploy. The focus continues to be basic life support and security requirements. More attention applies towards the acquisition of construction material, heavy equipment, quality-of-life items, and office equipment. The establishment of a contracting office with a solid and reliable vendor base is a key priority in this phase.

c. Phase III: Sustainment

The sustainment phase of a contingency operation runs from the end of the buildup stage through the point that redeployment begins. Focus increases on providing permanent facilities and equipment, office supplies, and discretionary services. The main priority of a CCO and his or her support team is establishing long-term, Indefinite Delivery Indefinite Quantity (IDIQ) contracts and Blanket Purchase Agreements that consolidate requirements—thus benefiting from economies of scale and reducing costs. Developing internal controls, minimizing waste and abuse, increasing competition among the vendor base, and transitioning the workload for the next round of contracting personnel or termination and redeployment is emphasized during the sustainment phase.

d. Phase IV: Termination/Redeployment

During the last phase, the urgency transfers to preparing for troop deployments to home or other areas of an operation. The CCO continues to focus on life-support contracts throughout the duration of the mission. New requirements may include packing and freight services, the transportation of troops, and the preparation of material and equipment for transfer (DPAP, 2012).

Contracting personnel are required to terminate or close out existing contracts and orders. This includes ensuring final payment to contractors and closing any open issues associated with their contracts. The CCO may transfer the files to an organization such as the Defense Contract Management Agency (DCMA), or the CCO may be responsible for storing or destroying the files, as appropriate.



B. DEFINITIONS

1. Contracting

The FAR (2013) defines *acquisition* as “acquiring by contracting with appropriated funds of supplies or services (including construction) by and for the use of the federal government through purchase or lease.” It is important to understand that the federal regulation notes that appropriated funds are required in order to contract for supplies or services. The government or the contractor may lease or purchase within terms of the contract (FAR 52.245–1(a), 2013). As part of our study, we review the acquisition process problems involving purchases and leases of supplies and services.

Within the FAR (2013) definition of *contract*, a contract includes all types of instruments that obligate the government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. Again, the FAR emphasizes that requirement of the use of appropriated funds for the acquisition of goods and/or services (FAR Part 2.01, 2013).

The National Emergencies Act (50 U.S.C. § 1621[A][B]), enacted in 1976, provides for certain procedures granting the President authority to declare a national emergency “with respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power” (50 U.S.C. § 1621[A], 2012). The FAR (2013) definition of *contingency contracting* refers to a national emergency declared by the President which sets the stage for contracting in a contingency environment.

The *Defense Contingency Contracting Handbook* (DPAP, 2012) states that “contingency contracting encompasses all contracting performed in a contingency environment (declared and non-declared), including military operations, stability operations, natural disasters, and other calamitous events” (Chapter 4).

The DAU (as cited in DPAP, 2012) defines *contingency contracting* as “direct contracting support to tactical and operational forces engaged in the full spectrum of armed conflict and MOOTW, both domestic and overseas.”



U.S. Forces–Afghanistan (USFOR-A) Publication 1–06, *Money as a Weapon System–Afghanistan* (MAAWS-A; USFOR-A, 2012), describes the Contingency Construction Authority (CCA) while describing the use of O&M funds on projects that meet specific requirements and states,

Construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under Section 201 of the National Emergencies Act, or a contingency operation. (p. 42)

2. Sustainment

The *Merriam-Webster* dictionary defines *sustain* as “to give support or relief to” and “to supply with sustenance” (“Sustain,” 2013). Previously, we described sustainment as Phase III of contingency contracting. The contracting activity expands into contracts for enhanced quality of life, such as facilities that are more permanent and equipment, in alignment with the preceding dictionary definition of *sustain*, “supply with sustenance.” Established procedures exist through the Army & Air Force Exchange Service, Navy Exchange Service, or the Defense Logistics Agency (DLA) to acquire local merchandise not available in the area of responsibility (AOR). The Army Sustainment Command’s mission “links National logistics capabilities, executes materiel distribution, and provides logistics solutions to enable unit readiness” (U.S. Army, 2013). Its assignment is to improve logistics support to troops on the battlefield (U.S. Army, 2013).

Contingency contracting performed during peacekeeping operations, combat operations, and post-conflict operations is a stable operation (DPAP, 2012, Chapter 4). To ensure joint military and cross-service coordination requires oversight. This can be a tremendous challenge if the requirement involves more than one military department, such as a Joint Force Command requirement major reconstruction-related contracting effort (DPAP, 2012, Chapter 4).

The Department of Defense Instruction (DoDI) 3000.05, Stability Operations (U.S. Department of Defense, 2009), defines *stability operations* as “encompassing various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe

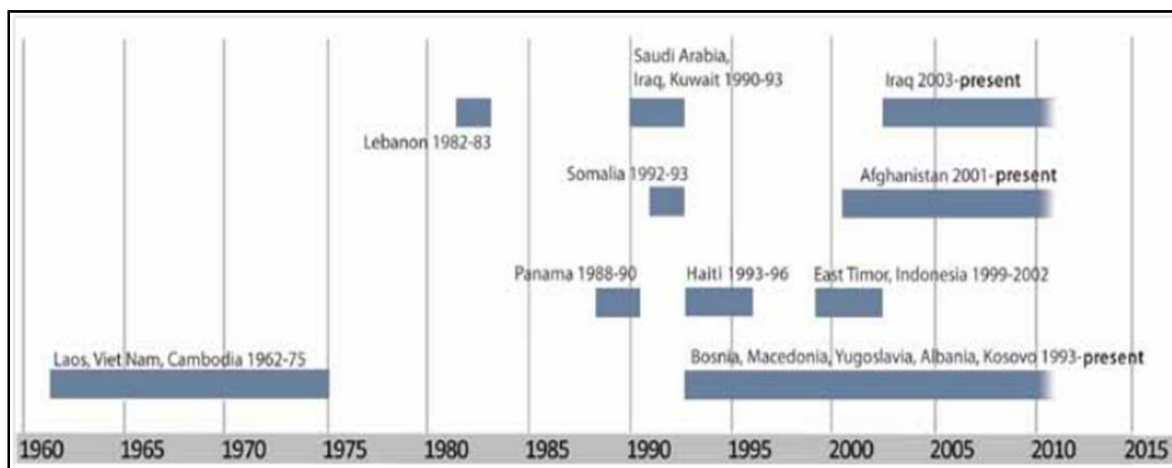


and secure environment, provide essential Governmental services, emergency infrastructure reconstruction, and humanitarian relief” (p. 1).

FAR 2.01 (2013) defines the term *sustainable acquisition* as “acquiring goods and services in order to create and maintain conditions (1) Under which humans and nature can exist in product harmony; and (2) That permit fulfilling the social, economic, and other requirements of present and future generations.”

Table 1 reflects the instances of the use of U.S. Armed Forces abroad between the years 1962–2011. The importance of this table is to reflect on the length of U.S. forces’ deployment overseas. Many of these longer deployments have longer sustainment periods, which require different approaches to the use of funds.

Table 1. U.S. Forces Abroad, 1962–2011 (Grimmett, 2011)



The importance of understanding sustainment and sustainment acquisition is that in a contingency environment, it is the third phase whereby acquisition missions are to improve upon the current conditions and also to create and maintain new conditions. We examine problems faced in contingency environments, and we analyze the constraints of fiscal laws and the stage of contingency environment to determine what problem(s) may or may not occur.

3. Acquisition Regulations

a. Federal and Agency Regulations

The FAR (2013) and additional regulations guide acquisition personnel depending on the DoD branch, agency, and programs. Links to these regulations are available in Table 2.

Table 2 is included to present the various acquisition regulations followed. The branch of service determines the application of the regulation that the contract is supporting and the hierarchy followed.

Table 2. Federal Acquisition Regulations

	<u>FAR</u>		<u>DFARS</u>		<u>AFARS</u>		
	<u>DARS</u>		<u>DLAD</u>		<u>NMCARS</u>		<u>AFFARS</u>
	<u>USTRANSCOM</u>		<u>AGAR</u>		<u>AIDAR</u>		<u>CAR</u>
	<u>DEAR</u>		<u>DIAR</u>		<u>DOLAR</u>		<u>DOSAR</u>
	<u>DTAR</u>		<u>EDAR</u>		<u>EPAARS</u>		<u>FEHBAR</u>
	<u>GSAM</u>		<u>HHSAR</u>		<u>HSAR</u>		<u>HUDARS</u>
	<u>IAAR</u>		<u>JAR</u>		<u>LIFAR</u>		<u>NFS</u>
	<u>NRCAR</u>		<u>TAR</u>		<u>VAAR</u>		<u>SOFARS</u>

For the purposes of our research, this paper focuses on the FAR (2013), the DFARS (2013), and the Army Federal Acquisition Regulation Supplement (AFARS; 2013). Members of the acquisition team use the FAR, which outlines procurement policies and procedures. If a policy or procedure, or a particular strategy or practice, is in the best interest of the government and is not specifically addressed in the FAR or prohibited by a law (statute or case law), Executive Order, or other regulation, government members of the team do not assume that it is prohibited. Rather, the team may innovate and use sound business judgment that is otherwise consistent with the law and within the limits of their authority in the absence of fiscal regulatory or legal direction. Contracting officers take the lead in encouraging business process innovations

and ensuring that business decisions are sound (FAR 102–4(e), 2013). We will also show where conflicts can occur when two military branches are involved in a project and the regulations differ.

b. DoD: DoD Financial Management Regulation

DoD 7000.14-R, DoD Financial Management Regulation (FMR) issued under the authority of DoDI 7000.14, DoD Financial Management Policy and Procedures (U.S. DoD, 2010). The publication provides statutory and regulatory financial management requirements, systems, and functions for all appropriated and non-appropriated DoD component-funding activities. Since contracts cite federal appropriations to pay for the goods and services, the statement of work on the contract must be consistent with the source of funding.

c. USFOR Publication 1–06: Money As a Weapon System–Afghanistan

The contingency contracting and funding process for the current war in Afghanistan is also regulated by the Army publication *Money As a Weapon System–Afghanistan* (MAAWS–A), USFOR-A Publication 1–06 (USFOR-A, 2012). The book provides warfighters with procedures for developing the proper documentation for procurement in the AOR.

Appendix A shows the basic procedures of the Four-Step Planning Process. The procedures indicate the optimal timeframe to process a requirement. Timeframes presented are more the exception than the norm. In this study, we examine the strains placed on the contracting commands using this process as well as the delays involved in obtaining funding for the needs of the warfighter.

4. Authorizations and Appropriations for Defense

The DoD exercises budget authority, which is the legal authority under an appropriation act to bind the government to make a payment from the Treasury. This budget authority allows the DoD to acquire good and services, build military facilities, and pay the military personnel and other outlays from the Treasury. Through appropriations, Congress grants the authority to the DoD to bind the government through



a binding agreement called an obligation. An obligation is a legal reservation of funds in the Treasury. Upon execution of the contract terms, the U.S. Treasury makes the payment.

Most defense appropriations are definite with an upper limit on the amount of the obligation, the period, and the specific use or purpose. For example, O&M funds are expense-type appropriations and have one-year obligation availability. Investment-type appropriations have multiple obligation periods due to the complexity and long lead-times to build or acquire the item (e.g., a building, aircraft, or vehicle).

Appendix D is the National Defense Authorization Act for Fiscal Year 2013 for wartime contracting. The action provides the action reporting requirements for the Secretary of Defense and DoD military.

C. FISCAL LAW

The United States Constitution, Article I, states, “No Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law.”

Funding comes in the form of legal authority and not money. The legal authority binds funding with the constraints of purpose, time, and amount. All appropriations have three characteristics that bind the actions of government managers. For an appropriation to be available for a legal expenditure, all three of the following must exist: (1) the purpose of the obligation or expenditure is authorized, (2) the obligation occurs within the time limits prescribed by Congress, and (3) the obligation and expenditure are within the amounts prescribed by Congress (GAO, 2009, Chapter 5).

1. Purpose Statute

Title 31 of U.S.C. § 1301, Appropriations, General, Application (a), states, “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” The statute requires programs to use funds only for the appropriated purposes and programs. This statute is the Necessary Expense Doctrine, and it has a three-part test.

- **The expenditure must be logically related to the appropriation.** The expenditure must be for a particular statutory purpose or must be necessary and incident to proper execution of the general purpose of the



appropriation. A necessary expense will contribute materially to the effective accomplishment of an authorized function.

- **The expenditure must not be prohibited by law.** A rationale for the necessity of a certain expenditure to carry out the mission of the agency is insufficient to overcome a statutory prohibition. In addition, agencies may presume that restrictions in an appropriations act are effective only for the FY covered unless the legislation clearly indicates that the restriction is permanent.
- **The expenditure must not be otherwise provided for in a more specific appropriation.** “Regardless of a logical relationship between the appropriation and the expense, if another specific appropriation applies to the given purpose of the expense, it must be used” (DPAP, 2012, Chapter 3).

2. Time Statute

Under 31 U.S.C. § 1502(a), Balances Available, and § 1552, Procedure for Appropriation Accounts Available for Definite Periods, an appropriation is available for obligation for a definite period. Funds not obligated within that period expire and are no longer available for new obligations.

a. Period of Availability

Most appropriations are available for obligation purposes for a finite period. O&M funds are available for one year, procurement appropriations for three years, and construction funds for five years. If the funds are not obligated during these periods, they expire and are not available for new obligations. Funds that have expired may be used to adjust existing obligations—for example, paying for a price increase after an in-scope change is executed for an existing contract with the appropriate obligation adjustment report approval (31 U.S.C. § 1552, 2012).



b. Bona Fide Needs Rule

The *Bona Fide Needs Rule* (31 U.S.C. § 1502[a]), Balances Available (2012), states,

The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

Examples of exceptions to the Bona Fide Needs Rule are the following:

- Lead-time: Allows an agency to consider the normal production lead-time when determining the need for supplies that are not available off the shelf. The lead-time can cross FYs.
- Stock Level Exception: Allows an agency to purchase enough supplies to maintain sufficient stock levels. The agency or program may use current year funds to replace stock consumed in the current year even though the replacement items are consumed the following FY.

No-year or continuing funds are those included in budgets for long-term programs or projects and remain available until exhausted or until the completion of the project defined as no-year or continuing funds (GAO, 2002). The Bona Fide Needs Rule, which provides that an appropriation limited to obligation for a definite period may be obligated only to meet a legitimate need arising during the availability of the appropriation, does not apply to the no-year funds, which are not so limited (GAO, 2009b).

3. Amount Statute

Under 31 U.S.C. § 1517, Prohibited Obligations and Expenditures (2012), agencies may not make or authorize an expenditure or obligation exceeding an apportionment or other formal administrative subdivision of funds. Further, the ADA is a principal statute that addresses the amount characteristic by prohibiting government officers or employees from the following:



- Obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds (31 U.S.C. § 1341(a)(1) (A), 2012).
- Incurring an obligation in advance of an appropriation, unless authorized by law (31 U.S.C. § 1341(a)(1)(B), 2012).
- Accepting voluntary services, unless otherwise authorized by law (31 U.S.C. § 1342, 2012).

If an agency finds itself in possible violation of the Amount Statute, unless it has transfer authority or other statutory basis for making further payments, it must seek a deficiency or supplemental appropriation from Congress and adjust or curtail operations as may be necessary (GAO, 2000).

It is a criminal act to knowingly enter into or authorize government contracts in the absence of sufficient government funds to pay for such contracts. A knowing and willful violation of 31 U.S.C. § 1341(a), Limitations on Expending and Obligating Amount (2012), or 31 U.S.C. § 1342, Limitations on Voluntary Services (2012), is punishable by a fine of up to \$5,000, two years in prison, or both. If someone violates this law, investigation begins, and the investigating agency files a written report with Congress.

DPAP (2012) reports the following common problems that trigger ADA violations:

- Without statutory authority, obligating current-year funds for the bona fide needs of a subsequent fiscal year,
- Exceeding a statutory limits or thresholds,
- Obligating funds for purposes prohibited by annual or permanent legislation, and
- Obligating funds for a purpose for which Congress has not appropriated funds (Chapter 3).



4. Apportionment, Allocations, and Reimbursements

When an appropriation bill is enacted, and after the beginning of the fiscal year, the Treasury issues an appropriation warrant to the Office of Management and Budget (OMB). The warrant establishes the amount of funds to be withdrawn for each appropriation title. With the warrant, the OMB may then apportion funds to the agency. Apportionment is the distribution of appropriated amounts available for obligation for specific periods, activities, and projects approved by the OMB and the Office of the Under Secretary of Defense (Comptroller). “The purpose of apportionment is to ensure that agencies spend at a rate that will keep them within limits imposed by their annual appropriations” (Lee, Johnson, & Joyce, 2004).

Figure 1, Appropriation Time Line, provides a graphic for the various types of funding. Obligations for the various types of funding range from one year to five years, with each beginning October 1 and ending at the end the term on September 30. All appropriations are available to expend for the following five years until the appropriation closes or lapses.

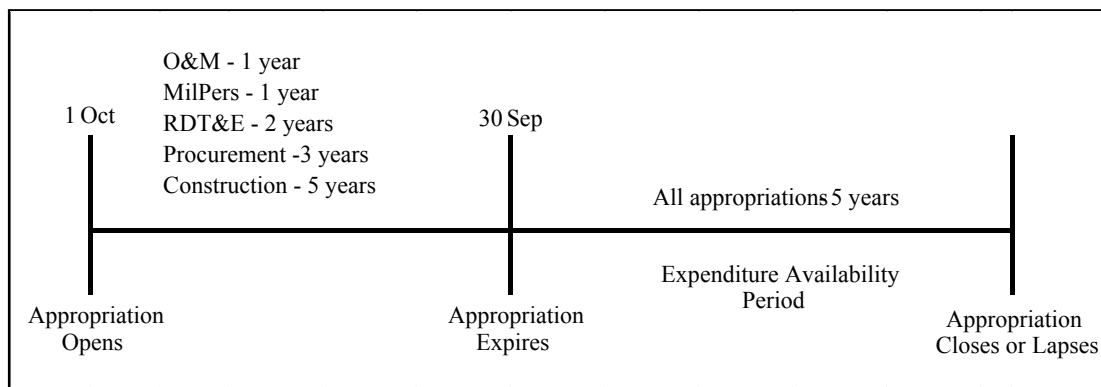


Figure 1. Appropriation Time Line (From Jones, Candreva, & DeVore, 2012, p. 241)

O&M funds are apportioned by calendar quarter by the OMB under the authority of 31 U.S.C. § 1513 (2012). Once the agency receives its apportionment, it allots funds to subordinate organizations. Expense accounts (O&M, military personnel [MILPERS]) are operating budgets, and serve as investment accounts as allocated. At the end of the allocation process, the USG makes commitments in the form of contracts with private industry, intra-governmental reimbursement transactions, and payroll.



a. Incremental and Severable Funding

Per DFARS 232.001 (2012), *incremental funding* means the partial funding of a contract or an exercised option, with additional funds anticipated provided later. An incrementally funded contract is a contract in which the total work effort is performed over multiple periods, and funds are allotted to cover specific phases or increments of performance.

Incremental funding obligates funding in segments. The contract design should link the obligations to specific milestones of the project or to specific periods. An incrementally funded fixed-price contract uses unexpired, available funds as of the date the funds are obligated and for severable services (DFARS 232.703–1, 2012). A severable project is one where the benefits received by the requiring activity run throughout the period of performance as work is complete; the services are capable of being divided into legally distinct rights or obligations as a contract. Examples of severable services include security or dining. According to 10 U.S.C. § 2410(a; 2012), an annual appropriation may fund a contract for severable services for a period of no longer than 12 months, even if the period of performance begins in one FY and continues into a subsequent year.

Fixed-price, labor-hour, and time-and-materials contracts for severable services may also be incrementally funded if full funding is not available at the time of the contract award and the contracting officer executes a determination and findings, approved by the requirements office, justifying the need for incremental funding due to the unavailability of funds (FAR 32.7, 2013).

Upon the contractor's notice as prescribed in DFARS 223.705-70 (2006), the use of the following Limitation of Government's Obligation clause states,

The contracting officer shall promptly provide written notice to the contractor that the Government is either providing additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount; terminate the contract; or consider whether to allot additional funds; and the contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and any costs expended beyond the Government's limitation of obligation are at the contractor's risk. In the event that the



contract receives no further funds, the contracting officer shall terminate the contract for convenience of the Government and provide sufficient funds to cover the full amount payable to the contractor. (DFARS 232.7007, 2006)

As part of the problems identified in Chapter I, incremental funding is an important issue involving contingency contracts. Since the requirements are generally not clear and concise, cost-reimbursement contracts create a tool to allow for unforeseen costs. Incremental funding is a common method for funding cost-reimbursement contracts. The use of incremental funding can increase the risk of ADA violations and is burdensome to the contract administrator. As addressed previously, the FAR (2013) imposes extensive rules for contracting using incremental funding.

b. Full and Non-Severable Funding

Fully funded contracts require funds that are obligated to cover the total price or target price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract (FAR 32.703-1, 2013). A non-severable service contract is one whose benefits to the requiring activity only occur at the end of the contractual period with a specific deliverable. In the event performance, full funding is required when determination is made that the tasks are not discrete or separate. The services (delivered in whole or prior to the completion before the requiring activity) must realize any benefit from the contract performance. In most cases, funding in full is required for contracts with non-severable services at the time of the contract with a then-current appropriation. The lead-time exception, noted previously, can apply to the start date of a service-type contract (DPAP, 2012, Chapter 3).

An FY contract may be initiated chargeable to funds of the new FY before the funds are available, provided that the contract includes the Availability of Funds FAR 52.232-18 (2012). This may be used only for O&M and continuing services that are necessary for normal operations and for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements.



For the length of one year, annual appropriations fund indefinite quantity or requirements contracts for services. An extension beyond the fiscal year in which the contract began, can be made provided that the minimum quantities to be acquired are certain in the initial fiscal year and that the terms of the availability of funds for the next fiscal year are included in the contract (FAR 52.232-19, 2013).

“The government shall not accept supplies or services under a contract conditioned upon the availability of funds until the Contracting Officer has given the contractor notice, to be confirmed in writing, that funds are available” (FAR 32.703-2(c), 2013).

D. CONTINGENCY FUNDING

1. Operations and Maintenance Funds and the Downfall of the *Reres Doctrine*

A \$750,000 O&M funding threshold exists for contingency construction and increases to a \$1,500,000 threshold for issues that threaten the life, health, and safety of the warfighter. Larger amounts use funding through military construction funds. However, some historical concepts of the *Reres Doctrine* justified the use of O&M funds by looking at the definitions of facilities, contingency, and construction.

Congress created three tiers of funding in 1982: MILCON, unspecified minor military construction (UMMC), and O&M. The only approaches were to finance combat and contingency construction with the authorized Military Construction Codification Act (MCCA; 1982) and the *Reres Doctrine*. During peacetime and the Cold War period, the structure worked well. During contingency periods, the system was “cumbersome and slow” and “the lack of a dedicated source of funding for contingency construction needs [can] ...impede timely response to urgent requirements of armed conflict” (Hughes, 2005; H.R. Conf. Rep. No. 108-76, 2003). To respond to these combat and contingency construction needs, the *Reres Doctrine* allowed the Army to use/reprogram/transfer O&M funds into MILCON funds. For example, the U.S. Central Command (CENTCOM) required construction of a \$1 million heliport to support operations in Kuwait, which exceeded the \$200,000 threshold for O&M at the time. The Staff Judge Advocate (SJA), 22nd Support Command, determined that



the heliport did not fall under the statutory provisions governing minor military construction. Accordingly, it was not subject to the O&M expenditure cap applicable to such construction. DESERT SHEILD was an operationPaving the desert was a project more akin to building bunkers or constructing anti-tank revetments. As limits to spending O&M funding did not apply to real-world operations or to combat-related military construction, no bar existed to building the helipad. (Borch, 2001, pp. 145–146)

The Chief Counsel of the Army Corps of Engineers agreed, and the opinion became the basis for many other combat construction projects during Operations Desert Shield and Desert Storm. However, the definition of *construction* provided by Congress did not create any “real-world” or “combat-related” exceptions.

Using the similar legal opinion for the humanitarian assistance appropriations, such as funding for projects in Somalia, Haiti, and the Balkans, the requirements were determined temporary operational requirements and not military construction. In Haiti, LOGCAP spent more than \$96 million of O&M funding for providing electricity to buildings and installing perimeter lighting and fencing and construction base camps (Center for Law & Military Operations [CLAMO], 2004).

Relying on the Purpose Statute, the Army’s Office of the General Counsel produced a policy memorandum for the proper funds to use for the construction of facilities to support military operations, which states “O&M funds were the primary funding source supporting contingency or combat operations” (Dorn, 2005). Therefore, O&M funds where “the appropriate funding source for acquisition of materials and/or costs of erection of structures... are clearly intended to meet a temporary operational requirement [during] combat or contingency operations” (Reres, 2000). The document intended to differentiate between contingency “acquisitions” and “military construction” by noting, “such structures may not be used for the purpose of satisfying the requirements of a permanent nature at the conclusion of combat or contingency operations” (Reres, 2000). The *Reres Doctrine* created its own definition of construction supporting combat operations, which is different from the construction definition at the time. Therefore, the military authorized the use of O&M funds for combat and contingency construction, and used/reprogrammed/transferred O&M dollars into any amount of MILCON funds



necessary to accomplish the mission. This eliminates the congressional limitations as to both purpose and amount (Hughes, 2005).

In February 2003, while the U.S. forces were conducting Operation Enduring Freedom in Afghanistan and preparing for Operation Iraqi Freedom, the Under Secretary of Defense authorized using O&M funds for construction under “narrowly limited conditions” (SECDEF, 2003). These conditions identified where O&M appropriations may be obligated and expended for construction if

1. There is proper documented determination that the construction is necessary to meet an urgent military operational requirement of a temporary nature, while U.S. Forces are participating in armed conflict or contingency operations...;
2. The construction will not be carried out at a military installation...or at a location where the U.S. is reasonably expected to have a long-term interest or presence; and
3. The U.S. has no intention to use the construction after the operational requirement has been satisfied and the nature of the construction is the minimum necessary to meet the temporary operational need. (Hughes, 2005)

During Operation Iraqi Freedom, the DoD reliance of the *Reres Doctrine* was crucial in the buildup and completion of thousands of construction projects in Kuwait and Iraq, including base camps, logistical support areas (LSAs), hundreds of helipads, C-130 airstrips, unmanned aerial vehicle landing strips, and hundreds of miles of improved roads and pipelines. During the planning of the invasion of Iraq, the Iraq Marine Expeditionary Force (I MEF) bridge assets were needed to cross the rivers along the attack route through the eastern region of Iraq. The I MEF wanted to purchase pre-fabricated bridges that exceeded the O&M threshold, costing several million dollars each, relying upon the Department of the Army and DoD memos to recommend the use of O&M as a “legally defensible alternative course of Global War on Terror (GWOT) action” (Hughes, 2005). Eventually, the I MEF ended up procuring the bridges using procurement dollars. Without the reliance on the *Reres Doctrine*, the military would not have been able to respond quickly in an uncertain security environment for the buildup for Operation Iraqi Freedom, which required the completion of construction projects in Kuwait and Iraq. If the military had relied on military construction appropriations when



military operations in Afghanistan began on October 07, 2001, the military would have incurred ADA violations. For FY2002 (after the September 11, 2001, attack), the FY2002 Military Construction Appropriations Act was signed in November 2001. The next annual appropriation cycle did not begin until June 2002 for FY2003, becoming law in October 2002. These timing delays would have had a severe influence on the mission, due to the mission's immediate urgency and need for rapid response.

In April 2003, Congress passed the FY2003 Emergency Wartime Supplemental Appropriations Act, which included language that posed an objection to the *Reres Doctrine*, amending the MCCA definition of *military installations* to include the language “regardless of whether such use is anticipated to be temporary or of longer duration” (Emergency Wartime Supplemental Appropriations Act, 2003). Congress stated,

Approximately \$750 million appropriated to operations and maintenance accounts have been obligated for construction activities supporting the global war on terrorism and operations in Iraq. Funds for these projects have been expended without providing notice to Congress despite repeated requests for information...and as required by law. (H.R. Conf. Rep. No. 108-76, 2003)

Congress observed that the DoD had circumvented “the statutorily mandated military construction process” and “created a class of construction activities for which it deemed operation and maintenance funds could be expended” (H.R. Conf. Rep. No. 108-76, 2003). “[W]ithout benefit of legal authority or regulation, the statutory definition of ‘military construction’ was obviated for certain types of construction projects” (H.R. Conf. Rep. No. 108-76, 2003). Congress went on to reject the DoD’s argument that “long-standing practice [enabled] it to utilize this legal construct under certain circumstances despite its effect of vitiating and/or amending the underlying statute” (H.R. Conf. Rep. No. 108-76, 2003). Specifically, Congress denied the DoD the authority to issue a policy that “turns an alleged practice into de facto law” (H.R. Conf. Rep. No. 108-76, 2003; Hughes, 2005).

The National Defense Authorization Action for Fiscal Year 2013 (Appendix E) in Section 2803, amended the MCAA for fiscal year 2004 to extend through fiscal year 2013 and allowed the DoD to have the authority to use O&M funds for construction



projects “outside the United States, which are necessary to meet urgent military operational requirements of a temporary nature” (NDAA, 2012, Sec. 2803).

2. Humanitarian and Civic Assistance Funds

According to the DPAP, humanitarian and civic assistance is the DoD term for relief and development activities that take place in the context of an overseas military exercise, training event, or operation. Under the Humanitarian and Civic Assistance Program, U.S. military personnel participating in overseas deployments also carry out humanitarian activities such as road and school construction, vaccination of children and animals, and well digging. Host-country civilian and military personnel assist in the execution of humanitarian and civic assistance programs. U.S. National Guard or reserve units also perform many humanitarian and civic assistance activities.

Funding for overseas humanitarian, disaster, and civic aid (OHDACA) provides relief to foreign countries. The use of OHDACA funds requires the DoD to provide 15 days’ advance notice to Congress before transferring any defense articles or services to another nation or an international organization for use in United Nations peace-related operations or any other international peacekeeping, peace enforcement, or humanitarian assistance operation (DPAP, 2012, Ch. 3).

3. Commanders’ Emergency Response Program

The Commanders’ Emergency Response Program’s (CERP) is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements in their AORs by implementing programs that immediately help the indigenous population. The CERP funds help the Iraqi and Afghan people without direct or indirect benefit to the United States, coalition, or other supporting military personnel. Typical uses of CERP funds include small-scale, low-dollar, short-term, employment-oriented, emergency, and high-visibility projects that benefit the Iraqi and Afghan people (DoD, 2013). Appendix C provide the National Defense Authorization Actions for Iraq, Afghanistan, and Pakistan. For the fiscal year 2013, CERP funding was reduced in half from \$400 million to \$200 million. We examine potential violations of fiscal law using CERP funds.



4. Defense Emergency Response Fund

Since September 2001, Congress responded to funding need for terrorist attacks with the use of the Defense Emergency Response Fund (DERF). It was also a case of delegated budget authority to the DoD. In October 2003, the Iraqi Freedom Fund received the balance of funds through a transfer from the DERF. The DERF account was designed to provide flexibility and immediate obligation authority when requirements are not specific and in times of crisis (Candreva & Jones, 2005). We examine the challenges incurred using DERF.

5. Afghanistan Security Forces Fund

The Afghanistan Security Forces Fund (ASFF) funds the current war on terror in Afghanistan. The ASFF budget provides the resource foundation needed to train and equip a 352,000 Afghan National Security Force and a 30,000 Afghan Local Police Force. The FY2013 budget request marks a shift as emphasis moves from building, equipping, and training to professionalizing and sustaining the force. The top priorities are leadership development and building enduring institutions. In FY2012, Congress enacted \$11.2 billion for the ASFF; the request for FY2013 was \$5.7 billion. According to the FY2013 request, the Coalition is transitioning the lead for security to the Government of the Islamic Republic of Afghanistan in tranches, completed during 2011; the schedule to begin the next tranche was in May 2012. The FY2013 ASFF budget request will allow the Government of the Islamic Republic of Afghanistan to continue on a path to assume the lead for all security operations by the end of 2014.

E. TYPES OF FUNDS

In this section, we describe the categories of funding during contingencies within defense appropriations. Each category has its own peculiar rules referring to the “Color of Money” for different fund purposes. Using the wrong type of fund may result in a violation of the Purpose Statute. It is important to understand the differences and limitations of the types of funds.



1. Military Construction

a. Definition

The term *military construction* in the U.S. Military Construction Code (10 U.S.C. § 2801(a), 2012) includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation whether to satisfy temporary or permanent requirements.” This includes any work necessary to produce a complete and usable facility, whether new or existing. Construction projects that exceed \$1.5 million in value require specific approval by Congress (DPAP, 2012, Chapter 3).

In USFOR-A (2012), the term construction is further defined to include the erection, installation, or assembly of a new facility; the addition, expansion, extension, alteration, conversion, or replacement of an existing facility; relocation of a facility from one installation to another installation; installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, generators, and theater seats); related site preparation, excavation, filling, landscaping, and other land improvements; and generators supporting real property.

Under FAR 36.102 (2013), the term construction refers to the construction, alteration, or repair of buildings, structures, or other real property. Construction includes dredging, excavating, and painting. Construction does not include work performed on vessels, aircraft, or other items of personal property.

A *military installation* is defined in the U.S. Military Construction Code (10 U.S.C. § 2801(c)(4), 2012) as “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the SECDEF.” The definition of military installation is also very broad and includes foreign real estate under the operational control of the U.S. military.

MILCON, according to the U.S. Military Construction Code (10 U.S.C. § 2801(b), 2012), includes all work necessary to produce a complete and usable facility (or a complete and usable improvement to an existing facility). The process of determining



what constitutes a “complete and usable facility” is the project scope or scoping. Splitting or incrementing the cost of a project to reduce costs below an approval threshold or the ceiling amount, also known as “project-splitting,” is prohibited by Army Regulation 415-32. This can happen when several projects occur at the same time or in a close proximity. To avoid incrementation or project splitting, each part of the project in itself must be complete and usable, and the total project is not complete until all parts are complete. The application of project cost accounting for interdependent facilities is used to account for costs. Contractor consideration of using this more costly process is weighed with the financial costs to the contractor and the ultimate benefit to the government. “Project accounting” is set up as a requirement in the contract terms. Interrelated facilities are mutually dependent in supporting those functions, having a common support purpose, but are not mutually dependent. When comparing two facilities, neither is necessary for the operation of the other. Separate projects or interrelated facilities use separate project costs. We provide cases studies that challenge the programs and contracting teams involved with interdependent and interrelated facilities and the impulse by requirement generators to increment or use *project splitting* to stay within the threshold limitations under current fiscal laws to meet urgent needs.

b. Military Construction Funding

MILCON funding is required to execute infrastructure improvements supporting military operations.

i. Specified Major Construction. Specified major construction requests, referred to as the Baseline / Master Plan Priority List, used for major facility investment projects exceeding \$750,000 using a five-year appropriation, are submitted to Congress for approval as inclusion in a Program Objective Memorandum (POM) approximately two to three years prior to execution. A Congress line item authorization is required. This funding is only meant for steady-state requirements at enduring locations, as defined in the CENTCOM (USFOR-A, 2012).

Specified major construction, referred to as Contingency Construction Priority List or Overseas Contingency Operation (OCO), is for major facility investment projects exceeding the \$750,000 threshold. The appropriation



duration, as authorized in the National Defense Authorization Act (NDAA; 2006), is typically two or three years. Since these projects are for overseas operations, submission of the project for inclusion in the President's budget is 18 months prior to the year of execution. Congress approves these projects, and a Congress line item authorization is required. According to the USFOR-A (2012), contingency MILCON is specifically for projects that directly support combat operations. The Office of the Secretary of Defense (OSD) does not permit contingency MILCON requests for bases in the CENTCOM Theater Posture Plan unless they are located in Afghanistan and support current contingency requirements (USFOR-A, 2012).

ii. Unspecified Minor Military Construction. Congress provides annual funding and approval for UMMC projects, not otherwise authorized by law, in the Military Construction Appropriations Act to each military department. A UMMC project is a military construction project with construction costs of \$2,000,000 or less (the threshold increases to \$3,000,000 if the project solely corrects an immediate deficiency that threatens life, health, or safety). A 21-day congressional notification period is required (seven days if completed electronically). Approval within the military department by the Service Secretary can take six to nine months, as long as funds are available. The appropriation, authorized in the NDAA (2006), is typically for two to three years (USFOR-A, 2012).

c. Contingency Construction Authority

CCA is a fiscal authority (not a separate appropriation) that allows the use of O&M funds on projects that would otherwise require MILCON funding. O&M is a one-year appropriation. Congress limits total project approval authority to levels specified in the NDAA; recently, this has been \$300 million in CCA for projects in Afghanistan. The Secretary of Defense approves projects' CCA funds (or as currently delegated to the Under Secretary of Defense [Comptroller]), and it usually takes between six and nine months, requiring a 10-day congressional notification period (seven days if completed electronically). The typical cutoff for submissions is May of each year to ensure the ability to award funding by the end of the FY.

CCA projects must meet the following requirements:



- Construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under Section 201 of the National Emergencies Act, or a contingency operation;
- Construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the installation is in Afghanistan;
- The U.S. has no intention of using the construction after the operational requirements have been satisfied; and
- Level of construction is the minimum necessary to meet the temporary operational requirements. (USFOR-A, 2012)

d. 2808 Reprogramming

In cases where Congress does not authorize funds, the Secretary of Defense can authorize MILCON projects with congressional notification and use already appropriated MILCON funding from bid savings or cancelled projects exceeding the O&M \$750,000 threshold. The appropriation duration is the same as the original appropriation. The approval process may take six to nine months.

2. Operation and Maintenance Funding

O&M funding provides resources required to conduct and sustain combat operations. O&M is the lifeblood of U.S. military daily operations. O&M funding influences almost everything that U.S. forces do on the battlefield either directly or indirectly. The period of execution for O&M is one year (October 1 to September 30). In order to comply with the Purpose Statute, USFOR-A (2012) states O&M funds are ineligible for the following:

- Purchases of or systems of personal property equal to or in excess of \$250,000.
- Projects with funded construction costs of \$750,000 or more (Department of the Army [DA], 2010).



- Projects with repair costs greater than or equal to \$750,000 when the repair to replacement ratio is greater than 50%, which needs Army Central Command (ARCENT) approval.
- Subsistence of military personnel (e.g., food, bottled water, and ice).
- Purchase of “in lieu of” substitutions for Military Table of Equipment (MTOE) items.
- Purchase of items centrally managed unless authorized specifically by an ONS & JUONS.
- Purchase of gifts or individual awards, except for specifically authorized awards programs coordinated through the appropriate departments (e.g., safety awards).
- Funding North Atlantic Treaty Organization (NATO), International Joint Commission, International Security Assistance Force, or missions of Coalition Forces. However, there are times when organizations provide support on a reimbursable basis.
- Funding Afghan National Security Force requirements (e.g., messing, lodging, training, force protection) unless on a reimbursable basis. (USFOR-A, 2012)

O&M funding is exclusive for maintenance and repairs. According to DA PAM 420-10 (DA, 2010), Facilities engineering: Construction and facilities management office operations, *maintenance* is defined as the “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters, painting, caulking, refastening loose siding, and sealing bituminous pavements).

Under 10 U.S.C. § 2811(e; OUSD, 2012), a *repair project* is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose. Use of O&M funds to pay for repair costs is appropriate to restore a facility or facility component to such a condition that the Army may use it for its designated purpose. Consideration as a repair project must show that the facility exists and is in a failed or failing condition. DA PAM 420-1 (2012) authorized repair by replacement.



3. Procurement Funding

Procurement appropriations fund the acquisition of capital items that benefit future periods. Examples of the use of procurement funds include the purchase of equipment, vehicles, and large tools (DPAP, 2012, Chapter 3).

The importance of using procurement funding is that the equipment purchased using procurement funds becomes government property. The government can make the determination regarding the disposal of the property after the expiration of the use and purpose of the property. The case study in this research will show the impacts of using procurement funds versus O&M funds in a lease versus buy example.

4. Military Personnel

MILPERS appropriations fund the payroll for those serving in the military. These funds are limited to one year. MILPERS funding and Federal Supply Service (FSS) are the use of organic resources (military personnel and government property). The military performs combat duties in theater as well as supporting the warfighter. The use of LOGCAP contractors allows military personnel to conduct wartime operations. In the case studies, the research shows how the use of organic resources reduces the costs of projects in order to fit within statutory O&M limitations.

5. Other Funding Sources

In addition to the regular appropriations provided in the base and OCO budgets, the Iraq and Afghanistan wars had some unique sources of funding. The intention was that these sources were more flexible than the routine sources of funding, but that flexibility was unusual, causing problems for both operational commanders and contracting officers.

a. Commander's Emergency Response Program

CERP funds enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their AORs by carrying out programs that will immediately assist the indigenous population. Initial resources for that effort came from stockpiles of Ba'athist Party cash left behind by



Saddam Hussein's regime. This cash funded CERP, along with other regime assets recovered following the overthrow of Saddam Hussein (Lee, 2010).

Initially, when commanders in the field received the authority to use the \$500,000 or more of CERP funds, confusion delayed use because the commanders thought the funds would fall under the restrictions of FAR bureaucracy, which require a 45-day plus source selection process. However, after further investigation, Congress became clear that the intent for the CERP money was to give commanders broad discretion in how they establish the methods of accounting for the use of the funds.

Today, CERP is available to commanders to respond to urgent humanitarian relief, reconstruction requirements, and stability operations, including civil security and restoring essential services, governance, and infrastructure (Lee, 2010). The use of CERP funds is more complicated in a contingency contracting environment, with the extended responsibilities of strict accounting and oversight of the funds placed on the commanders, as compared to the use of O&M funds.

The DoDIG reported needed improvements in the CERP program whereby the U.S. Central Command (USCENTCOM) and U.S. Forces-Afghanistan (USFOR-A) had control over the CERP contract payments. They were unable to maintain adequate and reliable data. The DoD allocated about \$3.2 billion in CERP funds to support the operations in Afghanistan, obligating \$2 billion and disbursing \$1.5 billion. DoDIG recommended that the USFOR-A improve the quality of the CERP data provided to Congress, assess the program's effectiveness, and ensure that the funds are used for the most beneficial and sustainable projects (DoDIG, 2012).

In March 2013, the Special Inspector General for Iraq Reconstruction (SIGIR) reported lessons learned from over the nine-year reconstruction effort in Iraq, stating that the CERP program "produced successes when used judiciously." The best CERP projects in Iraq according to General Lloyd Austin are those where requirement teams size situations to wisely target local needs. The more unstable the situation, the smaller the project should be (Bowen, 2013, p. 130). General Petraeus stated that there were a number of notable successes in the Iraq program, and the Interior Ministers in Iraq complimented the crucial contributions provided by the MNS-I (as cited in Bowen, 2013).



b. Defense Emergency Response Fund

The Defense Emergency Response Fund (DERF) was an existing account designed to provide flexibility in times of crisis and to provide immediate obligation authority at times when a need arose but before the specifics of the operation were available. The global war on terrorism was just that sort of scenario. Created in FY1990, the DERF provides a source of immediate funding in the event that the military responds to a domestic problem, such as hurricane relief. In 2001, the DERF became a convenient tool for funding the initial response to the September 11, 2001, attacks. The fund was extremely flexible, and the normal purpose, time, and amount restrictions were almost nonexistent. The funds, with no expiration date, were applicable for anything related to the response to the terrorist attacks, and they had no expiration date.

Commanders found the development of requirements difficult when attempting to predict funding amounts for appropriations, particularly in situations of unknown or changing requirements. Without this information, the risk of fiscal violations is high. The DERF account provided the ability to allow military commanders to enter contingency environments and provide the necessary items to complete urgent missions.

The DERF was to allow the DoD to provide disaster relief assistance without depleting the funds it needs to accomplish its mission. The DERF centralized DoD financial accounting for the disaster assistance it provides. Examples of the use of the DERF include the following: in 1991, it was used for disaster relief in Bangladesh; in 1994, it was used for refugee assistance in Rwanda, Cuba, and Haiti, and for humanitarian assistance on nine other overseas projects; and in 2006, it was used to assist the earthquake victims in Pakistan. In FY1995, the DERF increased to \$299.3 million to cover FY1994 costs in Rwanda and Cuba, after initially being funded for \$100 million. The DERF is not a reimbursable account.

This funding source had its complications when the Department of State was to reimburse the DERF for 11 overseas projects totaling \$12.1 million as reported by the DoD Inspector General in 2008. Since the DERF is not a reimbursable account, the DoDIG recommended de-obligating the funds and returning them to the treasury (DoDIG, 2008).



GAO Report 03-346 (2003) found that the DoD's ability to track the use of emergency response funds had varying limitations depending on the appropriation. For the initial fiscal years of 2001 and 2002, separate management existed for the emergency response funds in DERF (\$15 billion). The DoD broke down obligations in 10 funding categories. The GAO could not correlate the information with its appropriation account structure. For the DERF provided in FY2002 and FY2003 (\$20.5 billion), transfers were placed into regular DoD appropriation accounts. Commingling funds made tracking the use of the 2002 and 2003 funds difficult. The intention of the DoD was to track obligations for contingency operations related to the war on terrorism. Methods put into place did not accomplish the intent. In 2002, the DoD acknowledged the limitations and implemented additional reporting on the use of the funds.

As previously discussed in our literature review, multiple definitions of terms are an issue when working in a contingency environment and with the use of funds. In September 2001, the OMB issued specific guidelines and criteria to identify and evaluate requirements funded under the initial emergency supplement appropriations. This guidance outlined 15 conditions to meet when determining two areas—response and recovery, and preparedness and mitigation. The conditions stipulate that the requirements must be “known, not speculative, urgent, not reasonably handled at a later time, and unable to be reasonably met through the use of existing agency funds” (GAO, 2003).



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III. ANALYSIS OF GOVERNMENT AGENCY REGULATIONS AND PUBLICATIONS

The purpose of this chapter is to review significant agency reports that address fiscal law concerns related to contingency contracting environments. The costs of the GWOT has created a lot of visibility and focus by Congress, resulting in agencies conducting investigations and audits, and preparing reports on the activities in Iraq, Afghanistan, Kuwait, and other contingency areas. In this chapter, we focus on the Gansler report (2007 and 2010 briefing), the Commission on War Time Contracting report, specific GAO reports and DoDIG reports related to contingency contracting, changes in the FAR, and laws related to contingency contracts and their impact on fiscal laws. We review these reports to illustrate the nature of the problem and to highlight the need for further changes in acquisition and fiscal laws to support mission needs in contingency environments.

A. ANALYSIS OF ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS REPORTS (GANSLER REPORT)

1. Background of the Study

The Secretary of the Army established an independent Commission on Army Acquisition and Program Management in Expeditionary Operations to review the lessons learned in recent operations and provide forward-looking recommendations to ensure that future military operations achieve greater effectiveness, efficiency, and transparency. The Commission assessed process (including internal controls), personnel, organization, training, policy, and regulation, as well as explored legislative solutions, to ensure that the Army is properly equipped for future expeditionary operations¹ (Gansler, 2010, p. 1).

¹ The term *expeditionary* includes both OCONUS and domestic emergency operations. The Commission believes that the term *expeditionary*—rather than *contingency*—is a broader term that better encompasses any future national defense and national security missions. The Commission therefore uses this term throughout the report.



2. Results of the Study

The 2007 Gansler Commission report and 2010 Gansler briefing found that the critical segments of the “Institutional Army” were not adapted to enable responsive acquisitions and sustainment for expeditionary operations. The contracting, regulations, and processes were specific areas of concern in the report that relate to our research on contracting in a contingency environment. These key failures encumber the Army acquisition system’s performance and significantly contribute to the waste, fraud, and abuse in theater by Army personnel (Gansler, 2010, p. 1).

The Commission (Gansler Commission, 2007) found that the Army contingency contracting personnel managed by personnel policies are “both out-of-date and irrelevant to the Army mission and challenges of today, especially those of expeditionary operations” (Gansler Commission, 2007, p. 13). Contracting officers complained of the use of incremental funding on contracts. This one area surprised the Commission. They expected concern from the contracting officers in the field about the color of money. All of the contracting officers noted that they were “COMPLETELY and UNNECESSARILY [capitalized for emphasis] burdened by incremental funding of requirements” (Gansler, 2010, p. 25). According to Gansler, “Contracting assets are overburdened in the field. The Army is providing operations and maintenance funds incrementally to contracting officers, at monthly or even shorter intervals” (Gansler, 2010, p. 25). The report (Gansler Commission, 2007) concluded that the a solution to address the funding challenge was by using an “Overseas Contingency Operations Transfer Fund” approach, but only if adequately resourced. This type of funding would be a defense transfer fund without color of money or fiscal year limitations (Gansler, 2010, p. 25).

Nearly eight years have lapsed since the issuance of the 2007 Gansler Commission report. The incremental funding issue continues to be an administrative burden to the contracting commands. As of March 1, 2013 (and in prior budget continuing resolution periods), the government entered into a phase of sequestration resulting in major budget reductions for the DoD. With funding for programs reduced, a funding shortage results. With the use of historical burn rates, inconsistent receipt of



funding increments is common. Funding documents amounts received are those that are available rather than applicable to an amount forecasted, requested, or historically based.

Funding burdens extend to the military in the field where concerns and stresses on commands where funds are imperative but are not made available to continue operations. Contractors also become anxious when funds are in short supply and when contracting officers have the option to issue a stop work order or a cancellation of contract for convenience.

3. Analysis of Fiscal Law Impacts

The Gansler briefing (2010) stated that the “defense requirements, acquisition, and budgeting system is not geared for this [urgent needs] environment” (Gansler, 2010, p. 5). Gansler recognizes progress made during the previous eight years, but the defense ad hoc “rapid” processes still experience “unnecessary and bureaucratic delays in needs generation and vetting of urgent needs, and in fulfillment and field of urgent solutions” (Gansler, 2010, p. 5).

Appendix G is a graphic of the DoD organizations and the 21 Urgent/Rapid programs that Gansler included in his 2010 briefing (Gansler, 2010, p. 14). The graphic shows the multitude of programs that make identification of the correct funding source difficult when engaging in a joint capability contingency mission. No consistent system or coordination exists for all of the military and agencies to document services, performance, and costs. These systems lack methods to assess sustainment needs and subsequent costs (Gansler, 2010). Each service has to work around methods for the procurement of materials and services in emergency-type situations. It is evident in this graphic that there is a need to coordinate and consolidate funding types to reduce the confusion throughout the DoD that is a challenge for the contracting officer. In contingency environments, many services, agencies, and branches work together to meet mission needs. When funding sources come from various areas, confusion can take place whether there is a need for reimbursement funds or funds used by another service, agency, or branch, resulting in potential violations of fiscal law. For example, national disasters may involve the Department of Homeland Security and/or Federal Emergency Management Agency (FEMA). We provide an example of this in Chapter IV, Case



Studies. Appendix K, provided in the Gansler 2010 briefing, also shows how each service has different urgent needs process, and it shows the complications that can occur when missions require joint services.

B. ANALYSIS OF COMMISSION ON WARTIME CONTRACTING REPORT

1. Background of the CWC Study

Congress established the CWC in 2008 to assess contracting for reconstruction, logistics, and security functions; examine the extent of waste, fraud, and abuse; and provide recommendations. The Commission made recommendations about contracting practices in current and future contingency environments (GAO, 2012b). The CWC final report issued in August 2011 reported 15 recommendations to Congress.

2. Results of the CWC Study

The CWC (2011) study noted the large number of contractors in Afghanistan and Iraq and the excessive burdens placed on the contracting communities to manage them. The 2011 report stated that total spending on contracts and grants in theater since FY2002 exceeded \$190 billion. The report summarized the recommendations into the following categories:

- Agencies over-rely on contractors for contingency operations.
- “Inherently Governmental” rules do not guide appropriate use of contractors in contingencies.
- Inattention to contingency contracting leads to massive waste, fraud, and abuse.
- Looming sustainment costs risk massive new waste.
- Agencies have not institutionalized acquisition as a core function.
- Agency structures and authorities prevent effective interagency coordination.
- Contract competition, management, and enforcement are ineffective.
- The way forward demands major reforms.
- Congress should provide or reallocate resources for contingency-contracting reform to cure or mitigate the numerous defects described by the Commission.



- Congress should enact legislation requiring regular assessment and reporting of agencies' progress in implementing reform recommendations (CWC, 2011, p. 4-5).

3. Analysis of the CWC Report and Fiscal Law Impacts

The CWC (2011) report did not specifically identify discussions or inquiries of any impacts of fiscal law on the contingency environment. Fiscal concerns were addressed within the report, which includes a discussion of the use of emergency spending and supplemental appropriations. The larger contractors addressed in the CWC report were funded with O&M funds that limit the programs. The report (CWC, 2011) stated that for the past 10 years, “overseas contingency-operations funding has been designed as ‘emergency spending,’ and funded through supplemental appropriations” (CWC, 2011, p. 32). These excluded appropriations from the regular budgetary process can distort the size of the federal budget submission by segregating substantial proposed expenditures as “subsequent supplement submissions” (CWC, 2011, p. 32). This allows agencies to avoid a prioritization of their program requirements in support of the war efforts and full costs of contracting. The CWC (2011) report stated that this creates an “illusion that contractors in a war zone are a free resource” (CWC, 2011, p. 32).

The CWC supports our position that the use of one type of fund (O&M) impedes and places challenges on leadership to obtain the resources needed to complete their mission in a contingency environment. This acknowledgement supports our study of constraints of fiscal law in a contingency contracting environment.

C. GOVERNMENT ACCOUNTING OFFICE REPORTS

The United States GAO compiles ADA information for each fiscal year and reports all relevant facts and a statement of action taken. The information is generally provided unaudited from the reporting agency (GAO, 2013). These reports provide a summary of the ADA violations, including the agency, amount, violation statute, dates, a brief description of the violation, and the remediation. We analyze all of these cases as a whole for the periods of 2005–2012 and look more specifically at those that occurred due to contingency operational environments.



According to the GAO website, DoD contract management is a high risk, and a key issue of focus. The website states that the DoD obligated approximately \$360 billion on contracts for goods and services in FY2012. Contracts also included those in support of contingency operations, such as Operation Enduring Freedom in Afghanistan (GAO, 2013). Much like the CWC (2011) report, the GAO reports that at times “the lack of an adequate number of trained acquisition and contract oversight personnel, the use of ill-suited contracting arrangements, and the absence of a strategic approach for acquiring services placed DoD at risk of not getting needed goods and services in a timely manner or potentially paying more than necessary” (GAO, 2013, p. 213).

A 2008 GAO report stated antideficiency controls and investigations need improvement. The GAO-08-1063 (2008b) report stated that the DoD’s complex and inefficient payment processes, non-integrated business systems, and weak internal controls impaired the DoD’s ability to “maintain proper funds control, leaving the department at risk of over obligating or overspending its appropriations in violation of the ADA” (GAO, 2008b, p.1).

During the DoD’s statement before the panel on Defense Financial Management and Auditability Reform in September 2011, Asif A. Khan, Director, Financial Management and Assurance, U.S. GAO, stated, “Funds control weaknesses place DoD at risk of violating the Antideficiency Act (ADA), specifically through over obligations and over expenditures” (Kahn, 2011, p. 1). The ADA was enacted to prevent agencies from incurring obligations or making expenditures in excess or in advance of appropriations. The ADA requires the DoD to report on its ADA violations. For the five-year time period from fiscal year 2007 through September 15, 2011, the DoD reported 64 ADA violations, with a “total dollar amount of just over \$927 million” (Kahn, 2011, p. 1). However, the DoD’s reporting of ADA violations may not be complete because of other pervasive internal control weaknesses (Khan, 2011).

D. DoD INSPECTOR GENERAL REPORT 10-059

DoDIG Report 10-059 (2010) is primarily about fraud and does not offer insights with respect to fiscal law constraints. However, the DoD contracting and financial



management process has inherent risks for ADA violations, which are probably exacerbated in a contingency environment.

DoDIG Report 10-059 (2010) reviewed the key aspects of the contracting process and found 10 systemic issues that included requirements, contract pricing, oversight and surveillance, property accountability, and financial management (refer to Appendix I). The chart in Appendix I specifically states that “financial management of funds for contract” (DoDIG, 2010) is one of the systemic issues of the contracting process. In 2012, the DoDIG issued a follow-up report reflecting that financial management of funds for contract include the following:

- Ensuring appropriated funds are used to fund the contract, and
- Ensuring fund obligations are not in excess of appropriated funding (DoDIG, 2012, p. iii).

The DoD had not completed corrective actions for 177 recommendations made from the previous reports that were issued between 2007 and 2010. The financial management recommendations totaled 79. As of the 2012 (DoDIG) report, 21 recommendations remained open, which is 44% of the total recommendations. The DoDIG recommended that the

contracting officer should make sure that appropriate financial management occurs for the life of the contract to include the type and amount of funds being obligated to the contract. Maintenance of complete, consistent, and accurate contract files and accounting records is necessary to reduce the potential for violations of the Antideficiency Act. (DoDIG, 2012, p. 37)

Fourteen contingency contracting reports identified financial management problems including management of funds in accordance with laws and regulations and preventing potential ADA violations (DoDIG, 2012).

1. Results of Study

The maintenance of complete, consistent, and accurate contract files and accounting records is necessary to reduce the potential for violations of the ADA. After review of several audit reports and investigations by the GAO and DoDIG, we have found our overarching references indicate that the government does not have sufficient



internal controls and business systems to identify and accurately account for obligations and payments, resulting in numerous potential ADA violations that may have gone undetected or resolved during the audit and not reported. Unidentified and uncorrected root causes for these violations cause concern to the government.

2. Analysis of Fiscal Law Impacts

As part of this research, we looked at potential ADA violations. Although this is not part of the DoDIG (2012) investigations report, constraints of fiscal laws are a concern. The concern is that there may be additional potential ADA violations or Funding or Obligation issues still under investigation. These are shown as “X” in the last columns of Appendix J (Contracting Problem Areas by Audit Report), which are the Financial Management columns of DoDIG Report 10-134 (2012).



IV. ANALYSIS OF CASE STUDIES

This chapter looks at both documented cases and realistic, but hypothetical, examples of situations where fiscal law places constraints on contracting in a contingency environment. The first section presents the more significant GAO ADA findings that occurred in a contingency environment. The second section presents realistic scenarios of impacts to military missions by contracting personnel through delays, extra costs, or extending the scope to meet the guidelines in order to avoid violating fiscal law. The cases show actual or likely events, and we developed them to illustrate potential problems; readers should not infer from them that any actual violation of fiscal law or contracting regulations occurred.

A. ANALYSIS OF GAO ANTIDEFICIENCY ACT CASES IN CONTINGENCY ENVIRONMENTS

As noted previously, the GAO records ADA violations and reviews controls and investigations. The GAO (Khan, 2011) reported that the DoD's complex and inefficient payment process, non-integrated business systems, and weak internal controls impair the its ability to "maintain proper funds control, leaving the department at risk of over obligating or overspending its appropriations in violation of ADA" (Kahn, 2011, p.1). Additional findings of the report show that the DoD has not fully complied with regulations due to the following: a lack of training, poor documentation, investigative personnel were not always available; the investigating officer(s) were not organizationally independent as "free of personal or external impairments to independence"; and the investigations were not completed on time (GAO, 2008, p. 1).

Because of our findings in this report, we analyzed the GAO cases in peacetime environments and contingency environments to determine if there is a pattern in the violations reported. Combined with the results of the DoDIG report (2010) of the number of potential ADA violations under investigation, we expect that the number of ADA cases related to the GWOT will increase, as further investigations take place. In Tables 3 and 4, we provide a summary of GAO reports on contracting issues. In Table 5, we analyze those cases in a contingency environment.



1. Analysis of GAO Cases, 2005–2012

The ADA is the principal statute that addresses the amount characteristic under 31 U.S.C. § 1341, Limitations on Expending and Obligating Amount; 31 U.S.C. § 1342, Limitations on Voluntary Services; and 31 U.S.C. § 1517, Prohibited Obligations and Expenditures. An amount statute violation, or 31 U.S.C. § 1341, Limitations on Expending and Obligating Amount, is incurring an obligation in advance of an appropriation, unless authorized by law. Violations, or 31 U.S.C. § 1517, Prohibited Obligations and Expenditures, is an amount constraint requiring that agencies may not make or authorize an expenditure or obligation exceeding an apportionment or other formal administrative subdivision of funds or incur an obligation in advance of an appropriation, unless authorized by law.

Other violations include an amount violation under 31 U.S.C. § 1342, Limitations on Voluntary Services, accepting voluntary services, unless otherwise authorized by law. The violation under 31 U.S.C. § 1502, Balances Available, is the Bona Fide Needs Rule time constraint. Obligating current year funds for future year needs is a violation of the Bona Fide Needs Rule and the Time Statute. An agency can also violate the ADA because funds in the proper account are unavailable at the time of obligation to correct the erroneous obligation.

Only three ADA violations also included a violation of 31 U.S.C. § 1301, Purpose Statute, which states, “Appropriations shall be applied only to the objects for which the appropriations were made.” One other violation of 31 U.S.C. § 3302 involved depositing reimbursements into the O&M account rather than the general fund of the Treasury, as required by the Miscellaneous Receipts Statute. Under the violation of 31 U.S.C. § 1553, the funds were left in an expired account, unavailable for new obligations.



Table 3. GAO-Reported ADA Violations by Violation Type, 2005–2012

31 U.S.C. §	Amount	Amount & Time	Purpose & Amount	Total by Violation	% of Total
1341	\$ 97,241,752.97			\$ 97,241,752.97	0.99%
1342	\$ 6,500,000.00			\$ 6,500,000.00	0.07%
1517	\$ 2,118,809,857.22			\$ 2,118,809,857.22	21.56%
1301 & 1341(a)			\$ 19,337.04	\$ 19,337.04	0.00%
1301(a) & 1517			\$ 388,838.09	\$ 388,838.09	0.00%
1301(a) & 1517(a)(1)			\$ 320,000.00	\$ 320,000.00	0.00%
1341(a)	\$ 1,830,707,668.02			\$ 1,830,707,668.02	18.63%
1341(a) & 1502(a)		\$ 87,492.00		\$ 87,492.00	0.00%
1341(a) & 1517	\$ 181,481.64			\$ 181,481.64	0.00%
1341(a) & 1517(a)(2)	\$ 524,546.00			\$ 524,546.00	0.01%
1341(a)(1)	\$ 45,052,221.58			\$ 45,052,221.58	0.46%
1341(a)(1)(A)	\$ 2,430,460,841.05			\$ 2,430,460,841.05	24.73%
1341(a)(1)(A) & 1342	\$ 68,849.29			\$ 68,849.29	0.00%
1341(a)(1)(A) & 1517(a)	\$ 3,275,587.87			\$ 3,275,587.87	0.03%
1341(a)(1)(A) & 1517(a)(2)	\$ 23,316,321.31			\$ 23,316,321.31	0.24%
1341(a)(1)(B)	\$ 820,802,671.79			\$ 820,802,671.79	8.35%
1341(a)(1)(B) & 1517(a)	\$ 16,403,711.68			\$ 16,403,711.68	0.17%
1517(a)	\$ 448,559,562.07			\$ 448,559,562.07	4.56%
1517(a)(1)	\$ 1,455,202,073.44			\$ 1,455,202,073.44	14.81%
1517(a)(1) & 1342	\$ 30,220.00			\$ 30,220.00	0.00%
1517(a)(1) & 1553	\$ 39,733,571.00			\$ 39,733,571.00	0.40%
1517(a)(2)	\$ 480,163,646.49			\$ 480,163,646.49	4.89%
1517(a)(2) & 1341(a)	\$ 8,215,989.00			\$ 8,215,989.00	0.08%
1517(a)(2) & 3302(b)	\$ 285,987.00			\$ 285,987.00	0.00%
1517(b)	\$ 264,016.16			\$ 264,016.16	0.00%
Total by Constraint Type	\$ 9,825,800,575.58	\$ 87,492.00	\$ 728,175.13	\$ 9,826,616,242.71	100.00%

The dollar amount of the reported ADA violations for the years 2005 through 2012 totaled over \$9.8 billion, with the largest amount being reported in 2009 at nearly \$2.27 billion, or 23%, averaging \$151 million per violation. The year 2007 showed the highest number of violations: 27 violations totaling \$2.167 billion, averaging \$80 million. In 2011, average violations totaled \$86.7 million with 23 violations reported, totaling \$1.99 billion. Such clauses are prima facie violations of the ADA because they constitute open-ended obligations of the government, even without the filing of liability claims under the agreement.

The largest ADA violation amount reported was \$1,636,619,522. This violation, reported by NASA Space Flight Capabilities, affected 11 accounts. In FY2007, NASA reported a 31 U.S.C. § 1517, Prohibited Obligations and Expenditures violation for FY2004 to March 2006 for \$30,400,000. NASA did not seek reapportionment of funds transferred to the Space Flight Capabilities Account, resulting in obligations in excess of the Space Flight Capabilities apportionment. In FY2005, NASA was in violation, again,



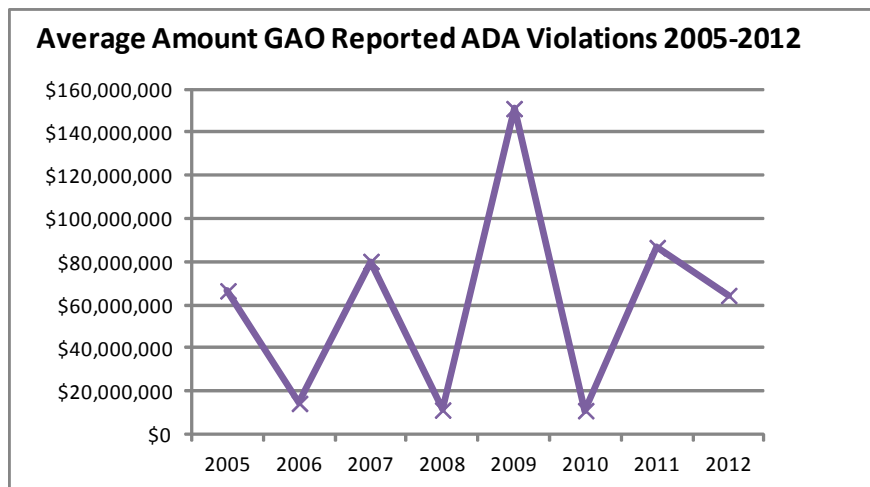
of 31 U.S.C. § 1517, Prohibited Obligations and Expenditures, for \$1,636,619,522, when obligations in excess of 11 affected accounts for the estimated unobligated balances carried in FY2005.

Table 4 shows the number of violations, total for each year, the percentage of that year's total to the population of violations analyzed, and the average ADA violation amount GAO reported between 2005 and 2012. Averages vary from year to year, clearly a phenomenon due to the variance in the size of the contracts, the agency, and the year of actual reporting of the incident. The average violation is over \$58.8 million. The actual incidents, for the majority of the cases, occurred several years before issuance of the ADA report. A violation of 31 U.S.C. § 1517, Prohibited Obligations and Expenditures, is an amount constraint whereby agencies may not make or authorize an expenditure or obligation exceeding an apportionment or other formal administrative subdivision of funds or incur an obligation in advance of an appropriation, unless authorized by law. In these cases, NASA performed an account adjustment to reconcile and balance the Space Flight Capabilities account, and the excess obligations corrected by subsequent apportionments (GAO, 2005–2012; FY2007 ADA report).



Table 4. Analysis of Average Amount of GAO-Reported ADA Violations, 2005–2012

Year	# of Violations	Total \$ by Year	% of Total	Average \$ by Year
2005	20	\$ 1,333,459,890	13.57%	\$ 66,672,994
2006	23	\$ 334,268,142	3.40%	\$ 14,533,397
2007	27	\$ 2,167,521,226	22.06%	\$ 80,278,564
2008	23	\$ 262,073,170	2.67%	\$ 11,394,486
2009	15	\$ 2,266,466,380	23.06%	\$ 151,097,759
2010	16	\$ 178,348,891	1.81%	\$ 11,146,806
2011	23	\$ 1,994,531,987	20.30%	\$ 86,718,782
2012	20	\$ 1,289,946,558	13.13%	\$ 64,497,328
TOTAL	167	\$ 9,826,616,243	100.00%	\$ 58,842,013



These reported violations include all agencies and all types of government environments, including CONUS and OCONUS. Seven violations explicitly related to contingency environments; others might have been related. Because of the time lag associated with investigating and reporting ADA violations, there could be others.

Table 5 is a list of the violations between 2005 and 2012 related to contingency-type environments. The majority of these incidents violated 31 USC § 1341(a), Limitations on Expending and Obligating Amount, whereby the officer or employee of the USG made or authorized an expenditure or obligation in excess of the amount available in the appropriation or fund for the expenditure or obligation. The remaining two incidents violated 31 USC § 1571(a) whereby the officer or employee of the USG made or authorized an expenditure or obligation exceeding the apportionment, or the amount permitted by regulation. Therefore, in all cases, insufficient funding was available at the time of the expenditure or obligation.



Table 5. GAO-Reported ADA Violations in Contingency Environments, 2005–2012

Type of Environment	GAO ADA #	Agency	Description	ADA Violation	Amount
National Disaster	12-08	EPA	Oil Spill Response	31 USC § 1341(a)(1)(A)	\$ 502,215.00
GWOT Response	12-10	JIEDDO	Construct counter-IED testing facility	31 USC § 1341(a)(1)(A)	\$ 13,750,000.00
Foreign Disaster	12-12	DoA	Haiti Relief Operations	31 USC § 1571(a)(1)	\$ 1,571,793.94
GWOT Response	09-01	DoA	Camp Bucca	31 USC § 1571(a)	\$ 16,802,792.00
National Disaster	07-12	DoA	Hurricane Support & Relief in the Virgin Islands	31 USC § 1341(a)	\$ 11,806,993.00
GWOT Response	07-14	DoA	Bonus' soldiers deployed to Afghan. Iraq and Kuwait	31 USC § 1341(a)	\$ 30,000.00
GWOT Response	05-14	DoNavy	Rapid mobilization following 9/11	31 USC § 1341(a)	\$ 21,800,000.00
				TOTAL	\$ 66,263,793.94

We further analyze some of these cases (GAO, 2005–2012) to understand the background of the violations and the constraints fiscal laws have placed on those attempting to meet urgent contingency mission needs.

2. Camp Bucca, Iraq, Internment Facility

Camp Bucca was located near the town of Umm Quasar, near the Iraq-Kuwait border. The camp hosted soldiers from multiple branches of the U.S. military and Coalition forces. The LOGCAP program is a services contract allowing O&M funds to fund minor construction expenditures. These funds are limited to \$750,000 today, unless the construction is to correct conditions that present a threat to life, health, and safety, when the O&M threshold is \$1.5 million. The Camp Bucca construction project clearly exceeded those thresholds.

The LOGCAP contractor's requirement was an extensive construction and expansion mission. Early projects included the construction of 20 LSAs, a shower facility, and an internment facility expansion project, and the erection of fences for 12 recreational areas inside the internment facility. In July 2006, the Army's Inspector General investigated the building of the internment facility located in Camp Bucca, Iraq, under the LOGCAP III contract. The report concluded in January 2007 that "Army personnel associated with funding of Phases I and II construction did not implement sufficient controls to ensure military compliance with applicable laws and regulations



resulting in two ADA violations with the FY 2004 Army O&M appropriation” (Bowen, 2007).

According to GAO reports (GAO, 2009; GAO, 2007–2012),

Third United States Army, U.S. Army Central Command improperly obligated FY 2004 O&M funds for the construction of two phases of an internment facility at Camp Bucca, Iraq. The Command should have obligated the FY 2004 Military Construction, Army appropriation. A violation of 31 U.S.C. § 1517(a), Prohibited Obligations and Expenditures, occurred when no appropriations were available to cover the obligations. The Command could not obligate O&M appropriations under 10 U.S.C. § 2805, Unspecified Minor Construction, because the obligated amount exceeded the statute’s obligation amount limitation. Neither could the Command utilize authority provided in the National Defense Authorization Act that authorizes O&M appropriations for construction outside the U.S. under certain conditions because the Secretary of Defense did not make the requisite determination that the conditions were present.

According to the GAO (GAO 2009; GAO, 2005–2012), the Deputy Secretary of Defense outlined what a project would need to meet each of the following conditions to use O&M in the Camp Bucca, Iraq, case (this case met all but the last criteria):

- Necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act, or a contingency operation.
- Construction is not carried out on a military installation where the U.S. is reasonably expected to have a long-term presence.
- The U.S. has no intention of using the construction after the operational requirements have been satisfied.
- The level of construction is the minimum necessary to meet the temporary operational requirements. Notification of obligation of funds: Within seven days after the date on which appropriated funds available for O&M are first obligated for a construction project under subsection (a), the Secretary of Defense shall submit to the congressional committee notice of the obligation of funds and the construction project.

If LOGCAP determined that the program was able to use the O&M funding for all of the conditions listed, the division would have needed to follow the notification of obligation of funds condition, which they did not.



3. Domestic and Foreign Man-Made or Natural Disasters and Emergencies

The U.S. Environmental Protection Agency (EPA) reported an ADA violation of 31 U.S.C. 1341(a) (1) (A), Limitations on Expending and Obligating Amount, in its Oil Spill Response Account for \$502,215. The violations occurred in November 2010, when the EPA exceeded the funds available in the account. The EPA was participating in the response to the Deepwater Horizon oil spill while at the same time responding to a major inland oil spill in Enbridge, Michigan. The EPA is able to disburse funds from its Oil Spill Response Account for its response activities in the inland zone. Sources of funds are resources appropriated to the EPA as advances and reimbursements under an ongoing interagency agreement or incident-specific Pollution Removal Funding Agreement. When the EPA expends its own appropriations, the agency may reimburse the EPA with funds available from the Oil Spill Liability Trust Fund under the Oil Pollution Act. The EPA expended more than the available cash balance in the Oil Spill Response Account.

The EPA's ADA violation was the result of an inadvertent report error. The EPA also noted that the limited available funding to the EPA under the FY2011 continuing resolutions—as well as delays in reimbursement, the lack of additional cash advances from the agency, and the unusual amount of funding requirement for the Deep Horizon and Enbridge oil spills—created a unique set of circumstances, causing the account to fall to a critically low level. The lack of cash advances and the unusual amount of the funding requirement increased the fiscal law challenges incurred by the EPA during the execution in response to these disasters.

Per the definition of *contingency* (i.e., “not certain to occur,” “something liable to happen as an adjunct to or result of something else,” “happening by chance or unforeseen causes”), these natural disasters will be a challenge to fund without prior knowledge of the complete requirements to define the costs. In this situation, multiple disasters complicated the matter further, along with improper controls to monitor the funding. The EPA has created a new policy to ensure that the funds are received from the paying agency to avoid an excess obligation or expenditure. Until the EPA receives reimbursements or an advance from the paying agency to replenish the account, the



appropriation cannot continue to disburse funds in the event that the cash balance falls below \$500,000. Despite the controls put into place, delays may still exist.

4. Marine Military Personnel Mobilization Antideficiency Act Violation, Case 03-10

After the September 11, 2001, terrorist attacks, a national emergency as defined under contingency operations was set up. During FY2002, the Marine Corps authorized 7,500 reservists to mobilize. Due to the complexities associated with the increased workload of mobilizing thousands of reservists and no accurate process for tracking costs, the Marine Corps made over-disbursements from the Military Personnel, Marine Corps appropriation until July 2003, totaling \$21.8 million. The act of over-disbursing violated 31 U.S.C. § 1341(a), Limitations on Expending and Obligating Amount, or the Amount Statute constraint. In August 2003, \$27 million of DERFs were provided to cover the Marine mobilization costs to correct the violation. The Navy also implemented procedures to preclude a reoccurrence of this type of violation. This violation was not included in the totals in Table 3 and Table 4, because it was reported prior to 2005.

B. MILITARY CONSTRUCTION CASES

Construction projects that exceed \$1.5 million in value require specific approval by Congress. MILCON projects generally take a minimum of six to nine months (for reprogramming approvals) and two years for authorization and appropriation by Congress. These time delays impede the accomplishment of urgent missions.

Hughes (2005) used the following example:

A commander requires the establishment of a base camp in a foreign country. The base camp will be used for an indeterminate duration, but certain facilities such as a perimeter fence and a command and control bunker are required immediately. Other facilities, such a helipad and a motor pool, would be welcome, but are not strictly necessary. (p. 7)

According to Hughes (2005),

The command could not scope the project to fund the perimeter fence separately from the command and control bunker. The command would not build the fence, but for the necessity of protecting the bunker, and the command would not build the bunker, but for the protection offered by the security fence. Based on these facts, the two projects are interdependent. (p. 7)



Total costs for this interdependent project is an example of a single project. An analysis determines if costs are within the \$750,000 O&M threshold. If the costs are not within the threshold range, the process begins with reporting and notification to Congress to appropriate MILCON funds. These actions are particularly burdensome to the command that needs the fence and bunker to protect the warfighter. Timing is a critical constraint in this situation.

According to Hughes (2005), the SJA should determine the following when analyzing the scope of the requirement:

1. “What components are necessary to meet the mission’s requirements and fulfill the commander’s intent?
2. [Are] the individual components...interdependent or merely interrelated?” (p. 7).

Scoping a project and including all of the MILCON work necessary to produce a complete and usable facility also prevents illegal incrementation, or what Congress has defined as “the foot in the door technique” (Hughes, 2005; H.R. Rep. No. 87-1858, 1962). These are cases where new and unanticipated requirements for a minor project will become apparent, requiring additional funds to be necessary to protect or enhance an already large investment that is not yet fully complete. Many times, unanticipated requirements contain known areas of scope, which were excluded from the project costs, knowing that the project would not fit within the legal thresholds. When facing the fiscal law constraints to obtain the appropriate color of funding, the commander gets “the foot in the door” to start the project and then continues to increase costs to get all of the scope that was originally intended. This may be a potential case of project splitting if the projects are determined to be interdependent.

As reflected in Appendix H, the DoDIG reported areas of fraud under “Pre-Award Requirements,” project splitting is an issue that uses Simplified Acquisition Procedures as a mechanism to work around the processes of review and approval (DoDIG, 2010, p. 38).

The SJA will also review the costs of the project to determine the application of payment of costs from the appropriation designated for the project. These costs include materials, supplies, civilian or contract labor, and services applicable to the project. It



will also review different appropriations available to fund any unfunded costs (e.g., military labor applied to Military Personnel Appropriations). Many times, a way to reduce the costs of a project is to use military labor, described as organic, or the FSS for materials.

C. LOGCAP Case Analysis

As a part of the John Warner NDAA for FY2007 (2006), Congress added Section 2333 to Title 10 of the *U.S. Code*, requiring the Secretary of Defense to “develop joint policies for requirements definition, contingency program management, and contingency contracting during combat operations and post-conflict operations.” As part of the development of these missions, the full life-cycle costs are to be determined by reviewing the research, development, testing and evaluation, procurement, MILCON, and O&M costs. The basic LOGCAP IV contract uses various types and combinations of contracts types. The following cases all describe fiscal law constraints that affected LOGCAP contracts.

1. Incremental Funding

The timeliness of the incremental funding is crucial to avoid a potential violation of the Amount Statute. The contracting officer must receive the funding source document and place it on contract prior to spending of the funds. Without this action, risks can be imposed on both the contractor and the government for potential stop work conditions, demobilization costs, remobilization costs, and increases in administrative costs.

Incremental funding, when used for large service contracts, accounts for costs in the billions of dollars and must be monitored and analyzed. Burn rates for estimated costs to complete and the estimated budget on the task order determine the amount of funding. Attempts to identify large fluctuations of costs include the use of impact study reports, cost variance reports, and correlation to work load drivers. However, this process occurs after invoicing and payment. This process is very complex and poses a high risk for fiscal law violations.

Due to its audit backlog, Defense Contract Audit Agency (DCAA) audits incurred costs years later. These audits will identify any unsupported, unallowable, unallocable,



and/or inapplicable costs. These types of costs identified by the DCAA are potential violations of the Purpose Statute, whereby funding is obligated for purposes other than what was authorized.

As contract specialists in LOGCAP and Reachback divisions, we are aware of the administrative burden and risk that incremental funding has placed on the contracting areas and support staff, who must prepare and review multiple modifications to task orders. Some funds are so small that that may cover as little as less than one day of contract service. Risk falls on both the contractor and the government for potential stop work conditions, demobilization costs, remobilization costs, and increases in administrative costs. Appendix J reports that financial management of funds is an issue in nine audits with potential ADA violations and Funding/Obligations problem areas under the financial management category. Contractors and suppliers report untimely payments, indicating possible fraudulent manipulations and diversions of government resources through finance or supply operations (DoDIG, 2012). As of March 2012, the Defense Criminal Investigation Service has 249 ongoing investigations primarily pertaining to Overseas Contingency Contracting involving public corruption, procurement fraud and theft, and technology protection (DoDIG, 2012).

2. Facility Construction Under LOGCAP III

In July 2003, the Combined Forces Land Component Commander extended the deployment of most U.S. forces in Iraq until February 2004. The Combined Forces Land Component Commander also ordered its subordinate commands to move soldiers out of tents and into adequate temporary billeting to provide better comfort. To accomplish the mission, the 101st Airborne Division, based in Mosul, Iraq, considered three alternative courses of action:

1. Using engineering brigades to build its own housing by purchasing construction materials, known as an organic approach. This estimated cost would be nearly \$25 million for complete and usable facilities. However, this required MILCON funds, which were not available.



2. Dividing the entire housing requirement into 33 separate, smaller projects with separate costs less than \$750,000. All of the projects were then below the statutory threshold and thus permitted O&M funding. The SJA would reject this approach as project splitting.
3. Re-evaluating the mission to down-scope the project, and use LOGCAP to provide billeting by bringing in relocatable buildings (RLBs). Total costs came to about \$65 million, plus \$8 million in potential administrative and award fee costs (Hughes, 2005).

LOGCAP III was an IDIQ contract with Kellogg Brown & Root (KBR). KBR provided the military with comprehensive logistics, engineering, and construction support during a deployment anywhere in the world. Under the contract, KBR's terms included providing services, such as billeting or dining facility (DFAC) support services, and then building the facilities required to perform that service. An example is when the contractor charges for costs for the facility as part of the contractor's direct costs. With the additional building added to the government's property list, the contractor begins maintenance on the building. "Funneling construction through LOGCAP, therefore, allowed the Army to accomplish indirectly what fiscal laws prohibited it from doing directly. Until the demise of the *Reres Doctrine*, units in Iraq took full advantage of the LOGCAP loophole" (Hughes, 2005, p. 21).

In December 2004, the Multi-National Force-Iraq (MNF-I) had decided that there was no LOGCAP exception to buying construction services, especially when there were no services contemplated other than the construction itself.

The Army Field Support Command issued guidance that created an analytical framework for SJAs to determine whether a LOGCAP III contract is a legitimate source to obtain construction services with O&M funding. As a resolution, construction is now included in the statement of work (SOW). The use of O&M funds is applicable if the construction costs fall within the thresholds. Otherwise, MILCON funds are the proper source.



3. Construction Timing Case

A more complex case occurs when, post-award, the field command has a requirement for construction and provides direction after completing the change management process identified in the *MAAWS-A* (USFOR-A, 2012). Appendix B identifies the lengthy and complex process for funding a construction requirement.

Under a LOGCAP scenario, if DFAC services are required, the contractor proposes to meet the requirement by serving meals in the contractor's own tents. If reasonably foreseeable construction of more substantial facilities will eventually be necessary, then the command should not accept the proposal because this would be a work-around to fiscal constraints. Thus, the DFAC would be under construction guidelines, and not merely services. The process is to separate the construction costs from the O&M support service costs before determining the proper appropriation to use to fund the work. If the mission's anticipated duration is short, on the other hand, then the proposal might be acceptable. If the forward operating base (FOB) duration is longer, and tents no longer meet mission requirements, then the program pursues normal construction funding channels to build a new DFAC.

Here, performance with construction was not reasonably necessary, and the contractor did not propose construction, but after award, someone within the Government directed the contractor [through the Change Order process²] to engage in construction activities. This direction by the Government to choose construction as a means for continued contract performance, rather than simply the contractor choosing construction as a means of performance, makes the activity a military construction project. (Hughes, 2005, p. 22)

4. Base Camp Expansion Example

In a similar example, a requirements generator contacted the LOGCAP division to expand a 500-man base to a 1000-man base with pre-designed temporary housing facilities occupied by the Army and the Air Force in an AOR that LOGCAP was not currently serving. The Army led the project with some funding provided by the Air Force.

² In response to the command's requirements documented in the SOW, the LOGCAP contractor develops and submits a proposed rough order of magnitude (ROM) cost estimate or technical execution plan (TEP) for approval. U.S. Army Materiel Command, AMC PAM. 700-30, LOGCAP 19 (2000). Under this analysis, if the contractor proposes to meet the SOW's requirements by charging the command for a construction project, then the purpose of those funds is construction, and MILCON funding rules must be followed (Hughes, 2005, p. 22).



The requirements generator proposed to change the initial DFAC and place a second DFAC in a temporary structure capable of accommodating a 28-day meal cycle for food services 24 hours, seven days a week. This task involved a remodel of the existing DFAC, bringing in larger stoves, refrigeration units, utensils, etc., with estimates exceeding the \$750,000 threshold. The proposed requirement from the field included the additional housing for the Army and Air Force. The question is whether the housing for the contractor would be within the confines of the AOR or on the economy. The proposed requirement from the field also included an athletic facility for the soldiers and office space for administrative functions.

The fiscal law concern is whether the proposed requirement (1) is an upgrade of the existing base with separate components that would be separate requirements or (2) is actually interrelated requirements that constitute a single undertaking. Further complicating the contract requirements were questions related to upgrades to the DFAC or a decision for a second DFAC, and whether the second DFAC was primarily benefitting the Army or the Air Force. In addition, if a second DFAC was constructed but it shared refrigeration units with the first, would it constitute a second construction project or an upgrade to the first?

What appeared to be a simple project turned out to be complex. These considerations—coupled with two services and multiple SJA opinions—frustrated all of the key players, and ultimately, the requirements generator canceled the project.

In this scenario, the responsible parties could be in violation of several fiscal laws. The commands had an urgent request, and O&M funds would be optimal. However, the costs of remodeling a DFAC and building a second DFAC would exceed the \$750,000 threshold, requiring MILCON funding. Attempting to segregate the DFACs and locating the facilities on separate sides of the base, using O&M funds, could be a violation of the Amount Statute, using the inappropriate color of money and depending on whether the need facilitated the necessity of two separate DFACs compared to remodeling the existing DFAC to accommodate a larger number of users.

The athletic facility was not interdependent and was treated as a separate requirement, which would not violate the amount constraint. However, SJAs may



contend that the DFAC, athletic facility, and billeting were for one purpose—the creation of a forward operating base—and should be considered one project with all costs included. The costs of the new base, using O&M funds, would exceed the threshold and violate the Purpose and Amount Statutes.

5. Relocatable Building Funding Case

Construction and Base Camp Development in the USCENTCOM Area of Responsibility (Headquarters, CENTCOM, 2013), known in the military as the Sandbook, stated that CENTCOM will establish non-permanent construction standards for contingency base camps and airfields:

Contingency construction standards apply to locations where no camp infrastructure exists, where existing support infrastructure does not meet force increases, or other requirements levied by missions or as an interim measure in support of building permanent infrastructure to support. (p. 5-1).

The Sand Book characterizes non-permanent contingency construction as initial, temporary, or semi-permanent. Initial construction requires minimal engineering effort for immediate use upon arrival for a limited time, up to six months, and durable replacement of temporary facilities during the course of operation. Examples of an initial construction would be tent-type structures. Temporary structures are intended for use up to two years but may be used indefinitely and are characterized by “austere facilities requiring additional engineering efforts which improve the durability, morale, safety and health standards of personnel” (Headquarters, CENTCOM, 2013, p. 5-2), including lighting, power systems, generator loads, and alternative energy sources. “Requirements for sustainable design and development do not apply” (Headquarters, CENTCOM, 2013, p. 5-4).

RLBs must be obtained in accordance with DoD I 4165.56 (Estevez, 2013), which limits the lease period to no more than three years. The idea behind this limitation is that the building is an interim facility pending the availability of permanent space in existing facilities or the construction of a permanent conventional facility. Options include organic RLBs obtained through FSS and not included in the O&M costs, using procurement funds, or purchased or leased by the contractor through the augmentation



clauses within LOGCAP by the contractor using O&M funds. It would appear that many options are available, and the needs of the military in the contingency environment would dictate the most efficient course of action.

Violating fiscal law is possible when the need exceeds the thresholds put in place by the constraints of current fiscal laws. The practice of citing the wrong funds, other than what is regulated, for the facilities, or construction of a more permanent facility for a short-term, interim facility will invoke a violation of the Amount Statute and the Purpose Statute. An example case describes an RLB that was close to completion by the Army when Special Forces (the occupants) realized that the internal wiring did not meet their needs. The Air Force engineers were working with the Army in a joint environment, and confusion existed over immediate correction of the deficiency for the RLB. According to a Department of the Air Force Engineering Technical Letter (Cook, 2002), newly constructed facilities cannot be modified within 12 months of the beneficial occupancy date unless the modification is necessary by a mission or an equipment change that was unforeseen prior to the occupancy date. The Army did not have a similar restriction. The electrical modifications project was completed under Army regulations guidelines (DoD Appropriation Act, 2007). Had the incident been an Air Force project, modifications would have not been made.

Regulations between the branches are not consistent, causing confusion and resulting in delays. In Appendix G, the OSD, Organizational, and Management Planning identifies the multitude of organizations and application funding for each branch, which increases the complication of working with other organizations having different regulations, requirements, and fund uses (DoDIG, 2010).

An RLB may be in the form of a building such as one that may be transported or removed or it may be a trailer-type Containerized Housing Unit, otherwise known as a CHU. According to DA PAM 420-11, *Facilities engineering: Project definition and work classification* (DA, 2010), at least 80% of the original project costs must be capable of removal from the site. The military refers to this as the “80/20 rule” in construction. There is a desire to use cement in and around the building, but it is expensive in the region and impedes on the 20% of the total costs, resulting in a possible reclassification



of the structure as permanent. If the total costs to remove the structure exceed the \$750,000 O&M threshold, it is a violation of the Amount Statute.

In longer term contingency operations, tenants of RLBs often demand extensive alterations to these units to make them more similar to permanent facilities, including things like air conditioning units and decks. If the facility contains decks and stairways bolted to the structure, the structure is a temporary minor construction and falls under the \$750,000 construction threshold. However, welded decks and stairways to the units make these structures permanent, requiring the use of MILCON funds. Such modifications also affect the 80/20 rule.

6. Repairs and Maintenance Case

Repairs and maintenance (R&M) to a facility prevent deterioration to the facility so that it is usable for its designated purpose. Repairs may include overhauling, reprocessing, or replacing parts or materials that have deteriorated due to normal wear and tear and not corrected through maintenance (DPAP, 2012). If there is a combination in a project, the project estimate lists each type of work and itemization of separate funds, as either O&M- or MILCON-type costs. MILCON funding is required when the work is so complex and integrated that separation is difficult.

Under LOGCAP IV, contractors conducted technical inspections, completed repairs to bring facilities to safe standards, and added to the government's property list. Determining the type of funding may be difficult if the building has a history of several types of uses. One commander may determine that the work is R&M and not construction (O&M), while another may view it as a major change to the structure and construction (MILCON).

7. Life, Health, and Safety Funding Case

Resolution of construction-related conditions that present a threat to life, health, and safety use O&M funds, up to a \$1.5 million threshold. Emergency and Extraordinary Expense Funds are used for smaller, unanticipated, short-notice construction projects. Emergency and extraordinary expense funds are limited to \$500,000 without notification to the Secretary of Defense and the appropriate congressional committees. The President



may also direct the Secretary of Defense to provide foreign disaster assistance in an effort to prevent the loss of life outside the U.S. in response to man-made or natural disasters.

CENTCOM regulation 415-1 (Headquarters, CENTCOM, 2013) states that O&M funds will be used to the maximum extent possible. The combined/joint task force and service component with contingency/wartime construction management authority receives prioritized submissions of construction requirements that exceed organic capability and/or the new construction O&M thresholds (Headquarters CENTCOM, 2013, p. 7-1).

After the 2008 death of a soldier in Iraq from electrocution, there was a discovery of widespread electrical problems in several buildings. The cost to replace the faulty electrical system in the facilities and through the FOB exceeded the \$750,000 threshold. Considered as a serious safety problem requiring immediate attention, the military was able to use the life, health, and safety exception threshold of up to \$1.5 million (Gamache, 2009).

In some cases, commanders requested conversion and updates from tents to RLBs on FOBs, using the O&M life, health, and safety exception when costs exceeded the \$750,000 threshold and stating that the upgrade offered greater protection from the elements and from action by hostile forces. However, such a rationale did not meet congressional intent for the use of the life, health, and safety exception (Gamache, 2009).

8. Haiti Case

The military needs to be able to respond on short notice. In Haiti, the LOGCAP division received a requirement for housing and sustaining 20,000 troops in five base camps for 180 days. The contract required KBR to receive and support 1,300 troops per day within 15 days of notification of the deployment. Within 30 days, KBR was required to support 20,000 troops in one rear and four forward base camps for up to 180 days, with options to increase the size of the supported force to 50,000 troops and to extend support to 360 days. The contract provisions called for base life support, which includes billeting, DFACs, potable water, sanitation, showers, laundry, transportation, utilities and other



logistical support, construction support, general logistics services, augmentation to engineer units, and facility engineer support.

Growth in the mission could easily lead to violations of the Purpose Statute and Amount Statute for O&M funding. Time constraints on funding could also be an issue if it were later determined that needs arose in one fiscal year and were satisfied from funds from different fiscal years. Contingency situations like in this Haiti example, where the requirement continues to increase, place a burden on decision-makers to ensure that sufficient funds are available prior to the obligation to avoid violations of fiscal law.

9. Lease-Versus-Buy Procurements

Equipment purchases over specific dollar thresholds require the use of Other Procurement Army (OPA) funds instead of O&M funds. These thresholds can impede efficient business practices. Equipment needed to support contingency environments includes things such as generators, vehicles, cranes, and construction-type equipment. The absence of OPA funds under LOGCAP to support the acquisition of certain types of equipment forces the contractor to lease the equipment. The costs for leasing the equipment may contain substantial risk premiums to cover the possibility of loss or damage. The lease arrangements also need to match the period of performance, which may require an additional cost. Often a lease-versus-buy analysis supports the case for purchasing, but funding limitations dictate leasing as the only option. Purchasing the equipment using O&M funds under LOGCAP would be a violation of the ADA using improper funds.

USFOR-A (2012) determined that military units were leasing about 3,000 vehicles at an annual cost of \$119 million using O&M funding. USFOR-A would have preferred to purchase the vehicles but did not have access to procurement funds. The leases were obtained through hundreds of small-dollar annual lease agreements and not through a central source for leasing, managing, or maintaining vehicles. The Afghanistan vendors were charging “exorbitant” lease rates for the vehicles, which were picking up 80% of the procurement cost during the first lease year. USFOR-A, with the General Services Administration (GSA), implemented a vehicle lease program with the ability to maintain 1,000 vehicles for about \$19 million a year. A program was fully in place by November



2011 (USFOR-A, 2012). If the equipment was altered (e.g., added protective armor), it needed to be restored to the original condition prior to return under the lease agreement.

10. LOGCAP Work Order Funding

In contingency environments, military construction repairs can be so small as to account to less than one hour of labor. Such changes to the task orders are administrative burdens to the contracting office, because they account for numerous, small, undefinitized change orders, and the cost of the administrative time and paperwork greatly exceeds the actual cost to perform the task. LOGCAP and DCMA reviewed these transactions to derive an annual total estimated number and average amount for each change order. Using those data, task order modifications included incorporated performance work statement (PWS) revisions into work orders. As such, the contracting team implemented a multimillion dollar, full-performance total budget equal to a specific number of work orders and the administrative contracting officer (ACO) is the responsible party to authorize tasks under the work orders. The implementation of these PWS revisions has saved hundreds of hours of administrative work for both the government and the contractor.

Some SJAs may contend that the funds were obligated before the need was identified, which would be in violation of the Time Statute and the Bona Fide Needs Rule. The violation of the Amount Statute exists when insufficient funds or over-obligated funds exist on a contract. Without proper oversight, the Purpose Statute is in violation if the work orders create a situation that splits a large construction project into small amounts, which would have required MILCON funding.



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V. CONCLUSION AND RECOMMENDATIONS

A. CONCLUSION

The analysis shows that despite the explicit instructions provided within the *MAAWS-A* (USFOR-A, 2012), *Principles of Federal Appropriations Law* (GAO, 2012a), and other government publications, the constraints of fiscal law—purpose, time, and amount—continue to exist and impede the completion of the mission.

The DoD is a large and diverse organization operating in various environments, which does not allow “one-size-fits-all” acquisition solutions. The numerous military branches and services each have separate sets of rules and processes. The government continuously updates and revises so each service has separate sets of rules and processes on a regular basis, including but not limited to the FAR, DFARS, and DFARS Procedures, Guidance, and Information (PGI). When operating in a peacetime environment, it is easier to view and apply rules that require more timing, oversight, and analysis prior to the procurement of goods, services, and construction. These are routine functions within departments using fiscal laws and contracting regulations as authorized by Congress.

For the past 10 years, the regular budget process has not included contingency operation funding, which has been designated as emergency spending and funded through supplemental appropriations. Distortion of the size of these budget submissions may happen by separating substantial proposed expenditures as subsequent supplemental submissions. The use of the supplemental budget also impedes on the transparency of the full cost of contracting, creating the illusion that contractors in contingency environments have an open checkbook to spend. Government contracting teams must procure the needs for contingency missions using the best value and best price practices and yet manage the risks to the government’s acquisition of goods and services. Cost-reimbursement contracts add to the illusion of an open checkbook for the contractor when a larger portion of the risk of performance for payment is born by the government rather than the contractor. Validation of contractor costs through DCAA-incurred cost audits is not timely, and contractor penalties become deferred to the future.



We have identified different contingency environments and phases within those environments. These phases require different operational and funding needs. We have determined that the current operations in Southwest Asia (SWA) operate for a longer period, resulting in a long sustainment period. This increases the opportunities for new scenarios that challenge SJAs to stay within the constraints of fiscal law, as shown by the increased equipment lease costs and fraud and waste reported by the GAO, DoDIG, and the CWC (2011). The use of O&M funds for the leasing of vehicles and equipment has cost the government more money. The lack of procurement funds in contingency environments has led to these extra costs as evidenced by the lease-versus-buy analysis showing that the purchase of vehicles would be of better value for the government in the long term.

Initial, rapid deployment of forces during mobilization stages may require large amounts of immediate funding. The Marine Corp example in Chapter IV shows the complexities associated with the increased workload of mobilizing thousands of reservists and no accurate process for tracking costs (Marine Military Personnel Mobilization Antideficiency Act Violation, Case 03-10). Sufficient funds were not available in the military personnel, Marine Corp appropriation.

As evidenced by the GAO's ADA reports, the risk of violating the Amount Statute laws increases in contingency environments, particularly those that involve natural and man-made disasters, such as the EPA's oil spill response and Haiti response, which we described in Chapter IV, Domestic and Foreign Man-Made or Natural Disasters and Emergencies . We have found that the 31 U.S.C. § 1341(a), Limitations on Expending and Obligating Amount, violations were real emergencies and contingencies requiring the rapid mobilization for storm support and oil spill response, as compared to a sustainment situation of construction to a FOB a few years into a war. The stress increases for the contracting officer to stay within the rules to avoid violation of fiscal laws.

After examining the military justification for the use of the *Reres Doctrine*, Congress admitted, "The statutorily-mandated military construction process is cumbersome and can be slow. Another complication is the lack of a dedicated source of



funding for contingency construction needs” (Hughes, 2005). Congress also frankly acknowledged, “These problems impede timely response to urgent requirements of armed conflict” (Hughes, 2005). During Operation Desert Storm, Operation Enduring Freedom, and Operation Iraqi Freedom, the military struggled to fund necessary construction projects when MILCON funds were not available and the length of time to obtain the funds precluded the rapid completion of the project.

Congress acknowledged the impediment of the statutes, yet provided limited flexible resources for military construction. Their attempts through Emergency Construction (10 U.S.C. § 2803), Contingency Construction (10 U.S.C. § 2804), and Construction Authority in a National Emergency (10 U.S.C. § 2808) statutes require notifications to Congress, waiting periods, determination of estimated costs, and in some situations, reprogramming of funds from unobligated funds. However, these authorizations ignore, underfund, and do not resolve the ultimate needs within combat and contingency environments. Resolutions are available for construction-related conditions that present a risk to life, health, or safety, which can be paid for with O&M funds within the \$1.5 million threshold. Emergency and Extra-ordinary Expense funds provide services for small, unanticipated, short-notice construction projects. However, such rationale did not meet congressional intent.

The funding for military construction is complicated with the numerous military regulations for facilities and construction. Applying those regulations in a contingency environment has impeded contracting for requirements and imposed risks of potential violation of statutes. Personnel in the field struggle with the massive number of changing requirements under urgent conditions that requiring reviewing:

- the analysis of requirements to separate construction efforts from O&M efforts,
- the requirement scope appears to be the strongest challenge, and
- the interdependent or interrelated relationships of components of the project, to avoid project-splitting.



Without aggressive oversight and review, the SJA's risk of potential fiscal law statute violation increases.

We examined the evidence of MILCON violations during the buildup and sustainment periods of wartime environments. The limitation on the use of O&M appropriations for MILCON to the \$750,000 MILCON threshold has been a challenge for SJAs to work with—unless there is a life, health, or safety aspect to the requirement, when the threshold increases to \$1.5 million. Revisions to rules and definitions help define what construction is and is not. However, challenges increase as requirement generators want to interject opinions and stretch rules to meet the current “urgent” needs. The difficulty is recognizing whether the needs are actually urgent or the requestors are using more of a gaming strategy. These strategies may be to avoid the lengthy delays of going through the military construction requirements for military appropriations or notifications to Congress under special appropriations. Non-permanent contingency construction has continued challenges. Additional rules, such as the 80/20 rule, help requirement generators determine the type of funds to use, depending on whether the structure will be temporary or will involve longer, permanent construction. Violation of fiscal laws is possible when the need exceeds the threshold put into place by the constraints of current fiscal laws. Citing the wrong funds for the structure, or constructing a more permanent facility than what is designated in the regulation for a short-term, interim facility will create a violation.

Challenges increase when contracting professionals meet the needs of the military with a high reliance on SJAs and other legal professionals to validate the proper use of funds and when those particular types of funds require long lead-times to obtain or are not available.

There are cases where minor projects have new and unanticipated requirements, which necessitate additional funds to protect or enhance an already large investment that is not yet fully complete. Knowing that the project would not fit within the legal thresholds, requirement generators do not include probable known scope requirements, as unanticipated requirements. SJAs have a heavy task of analyzing requirements for the potential of project splitting and incremental requirements by reviewing the



interdependency and inter-relationship of projects. Interdependent projects use full funding as a single project. The concern with the fiscal law in place is whether the proposed requirement is an upgrade of the existing base with separate components that would be separate requirements, or requirements that are interrelated and constitute a single undertaking.

The SJAs also review the project to avoid violation of the Purpose Statute when there is a combination in a project. The requirements generators must identify each type of work, request separate funding, and itemize this information in the project estimates. If the work is integrated, the separation is difficult, and the work is categorized as MILCON, resulting in possibly delays and administrative burdens of congressional reporting.

The multitude of programs make identification of correct regulations and funding sources difficult when engaging in a joint capability contingency mission, as described in the examples between the Army and Air Force. When the Air Force regulation did not fit the mold for the requirement, the Army used its regulations. No consistent system or coordination exists for all of the services to document services, performance, and costs. These systems lack methods to assess sustainment needs and subsequent costs.

The growth of a mission could easily lead to violations of the Purpose Statute and Amount Statute for O&M funding. Time constraints on funding could also be an issue; Programs found that needs arose in one fiscal year and were satisfied from different fiscal year funds. Evidence of time constraints can be explained when agencies attempt to correct an older ADA violation, sufficient funds are not available, and the time has lapsed.

Much like the CWC (2011) report, the GAO (2013) reports that at times,

The lack of an adequate number of trained acquisition and contract oversight personnel, the use of ill-suited contracting arrangements, and the absence of a strategic approach for acquisition services placed DoD at risk of not getting needed goods and services in a timely manner or potentially payment more than necessary. (p. 213)

The GAO (2008) has also stated that the DoD's complex and inefficient payment processes, non-integrated business systems, and weak internal controls impair the DoD's ability to "maintain proper funds control, leaving the department at risk of over obligating or overspending its appropriations in violation of the ADA" (GAO, 2008, p. 2). The



CWC (2011) report did not specifically identify discussions or inquiries of any impacts of fiscal law on the contingency environment.

The Gansler briefing (2010) stated, “[the] Defense requirements, acquisition, and budgeting system is not geared for this [urgent needs] environment” (p. 5). Too many identified areas are fraudulent and wasteful. The DoDIG (see Appendix J) identified nine audits indicating nine areas of potential ADA violations and three audits related to funding and obligations problem areas. Concluding from the date of the GAO reports and the actual date of occurrences, we argue that the process of investigations is slow and delays exists when reporting ADA violations. We believe that the number of ADA violations in response to the GWOT will also increase as investigations conclude in the next four to six years. The maintenance of complete, consistent, and accurate contract files and accounting records is necessary to reduce the potential for violations of the fiscal laws and the ADA. These agencies have identified the complexities involved in the oversight and management of contracting and funding in contingency environments and the weakness in DoD business systems and internal controls. The USG makes improvements continually, but reported violations are still open. We recognize that this area is expensive and a long-term solution is necessary to minimize the violation of fiscal laws and management of the current fiscal law constraints.

Instances have also occurred where the contracting professional has pushed back on the requirements generators to obtain sufficient information in order to mitigate the risk of violation of fiscal laws, particularly the Purpose Statute. This has resulted in delays and ultimate cancellation in completion of requirements, as in the example of the FOB expansion. Known attempts were made to funnel construction through LOGCAP, thereby allowing the Army to accomplish indirectly what fiscal laws prohibited it from doing directly. This again was not the intent of congressional appropriations. Continual SJA oversight and possible movement of MILCON projects to the Corps of Engineers may minimize some of the exposure to the LOGCAP IV contract. However, the needs continue to exist in the current sustainment wartime period. The LOGCAP IV program has adaptive changes to the PWS to incorporate small construction within the fiscal law constraint thresholds. Nevertheless, oversight continues to be a challenge in CONUS and OCONUS.



Unlimited funding for contingencies—for example, provided through DERF and CERF—in the past has shown that commanders in the field have had difficulties accounting for the expenses in addition to conducting their missions. Current limitations of funding through supplement appropriations, creating delays, postponements, and difficulties prioritizing program requirements are constraints on contingency contracting.

The lack of OPA funding in contingency environments and under the LOGCAP IV contract to support the acquisition of certain types of equipment has forced the contractor to lease equipment. The costs of leasing contain substantial risk premiums to cover the possibility of loss or damage. In the examples of Afghanistan draw down, the conversion of the leased equipment back to the original condition may require additional funding, which may or may not have been considered at the origination of the contract and which may result in potential violation of full funding requirements. The contracting officer needs to consider all life-cycle costs of the item to determine funding requirements. The business case analysis of whether to return the altered lease equipment, destroy the equipment, or consider other solutions results in further administrative burdens on the contingency contracting offices.

Contracting officers continue to receive funding through incremental funding sources, which are limited at the time of this research. The current, March 2013, sequestration, and DoD requirement to reduce the budget, increase the administrative burdens for managing contingency contracts. The Gansler report (2010) found that the critical segments of the “Institutional Army” were not adapted in order to enable responsive acquisitions and sustainment for expeditionary operations. The contracting, regulations, and processes were specific areas of concern in the report that relate to our research of contracting in a contingency environment. One area that surprised the CWC was that none of the contracting officers in the field were concerned about the color of money but rather complained about the contracts being incrementally funded. The administrative burden incremental funding has placed on the contracting areas and support staff, who must prepare and review multiple modifications to task order, continues. The current budget environment at the time of the writing of this project has revealed additional burdens on the contracting officer, including receiving a small amount of incremental funding insufficient to cover reasonable periods of time. This



results in risks to both the government and the contractor of stop work or performance without funding.

B. RECOMMENDATIONS

“Lessons from 10 years of contingency contracting in Iraq and Afghanistan have led to many legislative, regulatory, and policy changes designed to improve processes and outcomes. However, better outcomes from these incremental improvements have in some cases not yet materialized, and in other cases have not been fully realized” (CWC, 2011). We believe the same is true for constraints of fiscal law in contingency environments. As the DoDIG, GAO, and the Army Audit Agency continue to investigate further incidents, investigators will see more violations of fiscal law statutes, not as knowing and willful violations but as government personnel attempting to complete their missions with the knowledge, training, and resources they have available. We are recommending the improvement of communication of investigation results and extensive training for all contingency contracting personnel (CONUS and OCONUS) on existing fiscal laws.

We recommend that Congress investigate a form of funding to support urgent procurements where lease-versus-buy analysis favors the purchase of equipment and vehicles. Implementation of O&M funding or a working capital fund for contingency services could provide a funding source to cover these types of purchases to support service operations. However, procurement funds are rare in service contingency environments, and the timing to obtain the funds is lengthy. The type of funds, color of money, is a definite constraint supporting missions in contingency environments and has impact to the cost of obtaining vehicles.

Military construction in contingency environments is complex. The military’s development of the requirements is critical to ensure that the appropriate funds are obtained to avoid ADA violations when completing missions and building up bases. Early design of requirements and accurate submission is important so that the SJA can clearly understand the urgent need and recommend the correct itemization of the type of funds. Ultimately, defining the requirements does fall back on the program to ensure that the proper funds are available before the funds are obligated.



To support contingency operations, the DoD can investigate the development of a flexible funding model that respects DoD obligation and expenditure target needs, taking into consideration joint mission operations and the application and integration with all services.

As stated by the CWC (2011),

The costs are too great and the risks are too high—both to the outcomes of current operations and to future contingencies—for the U.S. Government not to commit resources to improving the contingency-contract function. Because many of the high-risk issues in contingency contracting mirror those that have also proven problematic in the overall federal acquisition system, implementing real improvement to the contingency-contracting process could enhance the entire federal acquisition system. (CWC, 2011, p. 34)

We recommend that the government commit resources not only to improve the contingency-contracting process but also to include financial management. This includes improvements to effective and efficient management and oversight tools to reduce the costs and risks. The government needs to continue improvements of business system transparency to all key government players of costs funded and obligated. This would decrease the inefficiencies and timely delays in the current incremental and interagency funding. Improvements could also include the creation of standards for approval of financial management processes and regulations for all branches. These improvements could ensure consistency and standardization to avoid the use of a more convenient regulation.

Congress continues to attempt to make some changes with the Wartime Contracting Reform Act of 2012. As shown in Appendix F, the DoD is objecting to imposing contract limit constraints to three years in Sec. 201. This may result in continuous cycles of competitive source selections and award when resources are constrained, reduce the amount of initial competition, and put additional burdens on contingency contracting officers to assess the need to exercise options that represent the best decision for the government. Cost and other efficiencies may increase when resources are scarce, particularly in contingency environments.



C. CONTINUED RESEARCH

We recommend interview research to determine whether correlations that exist between the constraints of purpose, amount, and time are similar in various contingency environments and in various phases of the contingency environment. Because of limitations beyond our control, we were not able to conduct interviews within a reasonable amount of time to offer additional support and evidence of these and other cases. We encourage further research to involve interviews with subject matter experts in the contingency contracting field.

We also recommend further investigation and possible legislative solutions for funding exceptions or broader changes in definitions, as seen under the *Reres Doctrine*, which would allow for the more extensive use of the existing O&M funding available in contingency environments. Definitions appear to have taken different shapes when we look at previous contingency environments compared to current combat contingency undertakings. Table 1, U.S. Forces Abroad, 1962 through 2011, as provided by the CWC (2011) report, shows that present operations in Iraq, Afghanistan, and Kuwait for the GWOT are nearing or have exceeded the 13-year Laos, Vietnam, and Cambodia operations period of 1962–1975.

Our recommendation is to continue research on this topic to include whether current fiscal laws are more applicable and supportive in certain types of contingency environments. We have seen that in wartime environments, such as during the Balkans mission, a “No Color–No Year” type of funding for military construction was effective in meeting the mission, but the transparency and accountability of costs by commanders in the field was difficult to manage under the business systems available to the government at that time. Business system improvements continue to increase transparency, but the process is slow.

Lastly, there is a need for further research on the use of incremental funding for cost-type contracts in contingency environments. The Gansler report research (2010) determined that contracting officers’ main concerns about the use of incremental funding and the risks imposed on both the government and the contractor can lead to mission delays and possible failure.



APPENDIX A. FOUR-STEP PLANNING PROCESS (USFOR-A, 2012)

This information is provided in the *Money As A Weapon System–Afghanistan* (USFOR-A, 2012) as the Four-Step Planning Process.

Step 1:

- Identify the requirement. To the extent possible, you must anticipate requirements through deliberate planning.
- Keep abreast of current operations to anticipate near-term needs.
- Gather information from planning meetings to anticipate longer term needs.
- Review old contracts to learn when periods of performance expire—your Contracting Officers Representatives (CORs) are invaluable in this process.

Step 2: Define the requirement. *No other step has greater bearing on success than this step.*

- What you do here will serve as the basis for legal, funding, and contracting decisions in future steps.
- Determine the five W's (who, what, where, when, and why).
- Your determination of the need will provide the Joint Acquisition Review Board (JARB) /Joint Facilities Utilization Board (JFUB) with the information to approve/validate your requirement.

Step 3: Prepare your spend plan. Local requirements for the spend plan may vary but will consist of the same general elements.

- The spend plan is due the 15th of every month to USFOR-A Joint Headquarters Finance or also known as Resource Management for multiple services (referred to as the J8) for the following month.
- Submit with sufficient time to allow for procurement lead-time and funding.
- Include validated and invalidated requirements. (See the chapter on Validation of Requirements.)
- Afghanistan is a requirements-driven theater. Funding is received from the Army Budget Office via the Army Central Command (ARCENT) for validated requirements.



- Invalidated requirements are important for situational awareness and will be funded as possible once validated requirements have been met.

Step 4: Prepare the requirement for either validation or funding. The following items are needed for the package:

- Staff Action Cover Sheet
- Completed funding document (See Purchase Request and Commitment (PR&C) or Military Interdepartmental Purchase Request(MIPR) sections to determine what's required)
- Letter of Justification (LOJ) describing the 5 “W’s” from Step 2 above
- A SOW for services–Contact your servicing Contracting Office for templates
- One Quote is required for requirements \$30,000 or less. Three quotes are required for requirements greater than \$30,000. Internet quotes are authorized.
- Independent Government Cost Estimate (IGCE): Required whenever items are not “off the shelf.” The RCC needs this to compare against received bids
- Appointment of Contracting Officers Representative (COR) for services and certain supply items that might require significant inspection and processing as determine by the Contracting Officer.
- Legal Review–Obtain from your local SJA for items costing \$10,000 or more.

All requirements must be validated by the appropriate board:

- JARB: Generally \geq \$200,000 for special interest items; USFOR-A Joint Chiefs of Staff Logistics (J4) is the theater process owner.
- JFUB: Generally \geq \$100,000 and USFOR-A Engineers is the process owner.
- Super Combined Acquisition Review Board (SuperCARB): \geq \$10 million;

ARCENT is the process owner; submission is through Joint Headquarters Services Logistics (J4).

- **Validation does not guarantee funds; they are requested through the Spend Plan process**

All funding requirements are subject to the force of U.S. law. In order to balance efficiency with proper oversight, USFOR-A combines a mixture of signature thresholds and validation boards to minimize risk.



APPENDIX B. *MONEY AS A WEAPON SYSTEM* – AFGHANISTAN MILITARY CONSTRUCTION PROCESS

The USFOR-A, updated in 2012, developed a manual to assist military and civilians in Afghanistan to process construction requirements. Below is the Construction Process.

1. Installations will develop project requirements and submit to their applicable Joint Facilities Utilization Board (JFUB). The JFUB evaluates and reconciles component requirements for real estate, the use of existing facilities, inter-service support, and construction/repair projects when conflicting or competing requirements materialize. The JFUB will review all facility requirements to include military construction (MILCON)-level projects. Due to approval levels, all MILCON requirements will be forwarded to the USFOR-A JFUB for review. MILCON submissions will consist of the following requirements:

- a. ONS/ LOJ no more than 60 days old
- b. Department of Defense Form 1391
- c. Site Map & Location Map
- d. Quad Chart
- e. Legal Opinion within 60 days of the requirement from local SJA
- f. Copy of Land Acquisition Request Form (if applicable)
- g. Mayor letter
- h. Explanation that requirements are for U.S. Forces only
- i. Reference to compliance Handbook standards
- j. Acquisition and Cross Servicing Agreements CC Form 35 when requirement supports Coalition Forces

2. A submission validated by the USFOR-A JFUB that exceeds O&M thresholds will be forwarded to the USFOR-A MILCON Program Manager to develop submission package.



3. The MILCON submission package will be sent through service components (typically Army (or Air Force) Central Command [ARCENT or AFCENT]) for authorization and funding and to United States Central Command (CENTCOM) for concurrence and validation. In addition to the JFUB requirements identified previously, the submission package will include the following:

- a. Endorsement letter signed by a General Officer including statement on how project adheres to strategic basing identified in Afghanistan Basing Strategy and other basing guidance documents.
- b. Base Overview depicting current & projected:
 - 1) Population (U.S., Coalition, Afghans)
 - 2) Housing/ DFAC capacity (reflecting initial, temporary, & permanent facilities)
 - 3) Water Storage (amount and days of supply)
 - 4) Fuel Storage (amount and days of supply)
 - 5) Airfield capacities 6) Other applicable metrics
- c. NATO Pre-Finance Statement

4. CENTCOM develops the Master Plan Priority List (MPPL) for Baseline MILCON and the Contingency Construction Priority List (CCPL) for Contingency MILCON. Service Components will submit MILCON requirements through Service specific channels/timelines.

Note: MILCON projects generally take a minimum of six–nine months (for reprogramming, Unspecified minor military construction [UMMC], and contingency construction authority [CCA]) and closer to two years (for MPPL/CCPL) prior to authorization and appropriation by Congress.



APPENDIX C. SUBTITLE B: MATTERS RELATING TO IRAQ, AFGHANISTAN, AND PAKISTAN

National Defense Authorization Action for Fiscal Year 2013

Passed Senate on 12/04/2012

(Sec. 1211) Amends the NDAA for FY 2012 to extend through FY2013 the CERP (urgent humanitarian and reconstruction relief) in Afghanistan. Reduces FY2013 funding from \$400 million to \$200 million.

(Sec. 1212) Amends the above Act to extend through FY2013 DoD funding for operations and activities of the Office of Security Cooperation in Iraq and associated security assistance teams. Reduces funding for such FY.

(Sec. 1213) Amends the Skelton Act to extend through FY2013, with reduced funding, DoD assistance for former insurgent reintegration activities in Afghanistan. Extends report requirements.

(Sec. 1214) Amends the above Act to extend through FY2013 a program to develop and carry out infrastructure programs in Afghanistan that support the counterinsurgency campaign. Reduces FY2013 funding to \$350 million. Prohibits the obligation or expenditure of more than 50% of such amount until the Secretary submits a plan for fund allocation and use.

(Sec. 1215) Amends the NDAA for FY 2010 to extend through FY2013 the Pakistan Counterinsurgency Fund for building the capabilities of Pakistan security forces. Extends a provision that limits the availability of amounts from the Fund to 40% until the Secretary reports to Congress on metrics for the use of such funds and for enhancing Pakistan's efforts to counter improvised explosive devices.

(Sec. 1216) Amends the NDAA for FY 2008 to extend through FY2013 DoD authority to reimburse certain coalition countries for logistical and military support provided in connection with Operation Enduring Freedom. Limits FY2013 funding. Prohibits any such reimbursements to Pakistan for claims covering any period when ground lines of supply through Pakistan to Afghanistan were closed to the transshipment of equipment and supplies in support of U.S. military operations. Requires a specified certification, from the Secretary to the defense and appropriations committees, concerning Pakistani cooperation with the United States prior to the obligation or expenditure of such funds for FY2013. Authorizes the Secretary to waive the certification requirement in the national security interest.



(Sec. 1217) Amends the NDAA for FY 2008 to extend through FY2013 DoD authority to provide logistical support for coalition forces supporting U.S. military operations. Repeals such authority for such FY with respect to Iraq (leaving only Afghanistan).

(Sec. 1218) Directs the Secretary to develop a strategy to support the government of Afghanistan in its efforts to achieve a secure presidential election in 2014.

(Sec. 1219) Requires the Secretary to provide for the conduct of an independent assessment of the strength, force structure and posture, and capabilities required to enable the Afghan National Security Forces to provide security for their country and to prevent Afghanistan from ever again becoming a safe haven for terrorists. Requires a report on such assessment, from the entity selected to the Secretary and the defense and appropriations committees. Provides funding.

(Sec. 1220) Directs the Secretary to report to the defense, appropriations, and foreign relations committees on the Afghanistan Peace and Reintegration Program.



APPENDIX D. SUBTITLE D: PROVISIONS RELATING TO WARTIME CONTRACTING

National Defense Authorization Action for Fiscal Year 2013

Passed Senate on 12/04/2012

(Sec. 861) Directs the Secretary to: (1) prescribe in regulations the chain of authority and responsibility within DoD for policy, planning, and execution of contract support for overseas contingency operations; and (2) report to the defense and appropriations committees on such regulations. Requires the Commanding General to assess such regulations and report assessment results to such committees.

(Sec. 862) Requires the Secretary, within one year after the commencement or designation of a contingency operation that includes combat operations and annually thereafter until the end of such operation, to report to the defense and appropriations committees on contract support for the operation. Provides an exception.

(Sec. 863) Requires the DoD military readiness reporting system to measure, on an annual basis, the capability of operational contract support for current and anticipated wartime missions. Makes the Chairman of the Joint Chiefs of Staff responsible for determining the operational contract support requirements of the Armed Forces and recommending appropriate resources therefore. Requires the curriculum for each phase of joint professional military education to include courses relating to contracting for contingency operations.

(Sec. 864) Directs the Secretary, within six months after the commencement or designation of an overseas contingency operation that includes or is expected to include combat operations, to perform a comprehensive risk assessment and develop a risk mitigation plan for operational and political risks associated with contractor performance of critical functions supporting such operation. Provides exceptions. Requires the Secretary to submit the assessment and plan to the defense and appropriations committees.

(Sec. 865) Amends the NDAA for FY 2008 to extend until February 1, 2015, DoD reports on contracting in Iraq and Afghanistan. Repeals Commanding General review of such reports.

(Sec. 866) Amends the NDAA for FY 2010 to extend through 2014 DoD temporary authority to acquire products and services in countries located along a major supply route to Afghanistan. Repeals an expired report requirement.



(Sec. 867) Applies, without exceptions or exemptions, Buy American requirements in the case of any textiles or components supplied by DoD to the Afghanistan National Army or the Afghanistan National Police for the production of uniforms.

(Sec. 868) Expresses the sense of the Senate that: (1) Latvia and other NATO member nations along the Northern Distribution Network routes (Network routes) are key economic and security partners of the United States and are to be commended for their contribution to ensuring that U.S. and International Security Assistance Force troops have reliable lines of supply to achieve their mission in Afghanistan; (2) when quality products at competitive prices are available, significant effort should be made to procure goods locally from Latvia and other NATO nations along the Network routes; and (3) Latvia and other NATO nations along the Network routes remain allies of the United States in the region, and a mutually beneficial relationship should continue to be cultivated between the United States and such nations.



APPENDIX E. TITLE XXVIII: MILITARY CONSTRUCTION GENERAL PROVISIONS, SUBTITLE A: MILITARY CONSTRUCTION PROGRAM AND MILITARY FAMILY HOUSING CHANGES

National Defense Authorization Action for Fiscal Year 2013

Passed Senate on 12/04/2012

(Sec. 2801) Prohibits any reduction in scope of work for a military construction project from resulting in a facility or item of infrastructure that is not complete and usable or does not fully meet the mission requirement for the project. Directs the Secretary concerned to ensure project contract compliance with the ADA.

(Sec. 2802) Directs the Commanding General to report to the defense and appropriations committees on the construction or renovation of DoD facilities with in-kind payments. Requires annual report updates for three years.

(Sec. 2803) Amends the Military Construction Authorization Act (MCAA) for FY 2004 to extend through FY2013 DoD authority to use O&M funds for construction projects outside the United States, which are necessary to meet urgent military operational requirements of a temporary nature.



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APPENDIX F. WARTIME CONTRACTING REFORM ACT OF 2012

National Defense Authorization Action for Fiscal Year 2013

Passed Senate on 12/04/2012

The Department objects to imposing contract term limits, as proposed in Sec. 201 that reduce contract performance periods for competitively awarded contingency contracts to three years. This limitation would require a continuous cycle of solicitation and contract award when resources are most constrained. Shorter contract periods may also reduce the amount of initial competition. Contracting Officers continually assess the need to exercise contract options to determine if continuing with an existing contractor represents the best decision for the government.

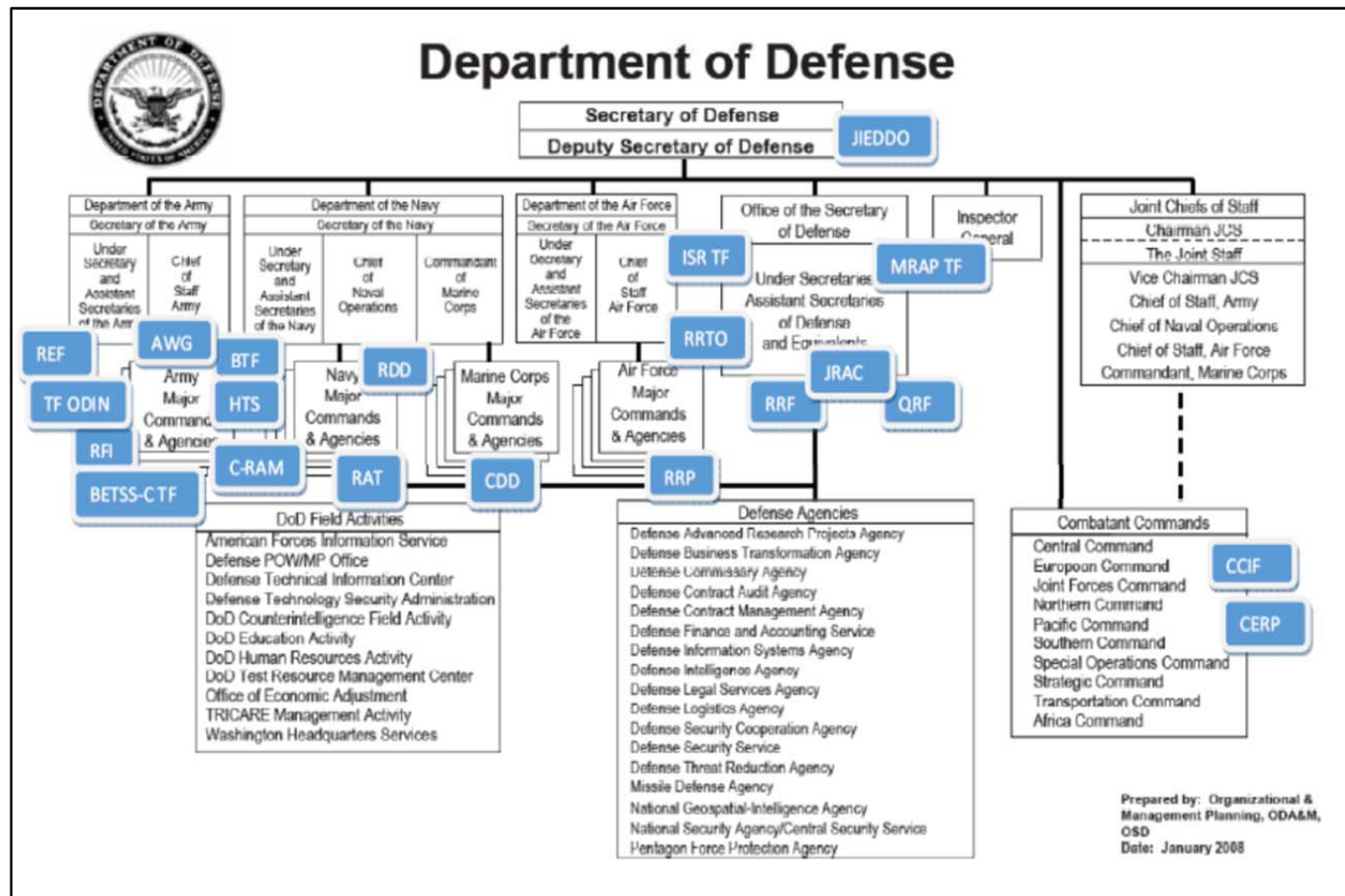
Limitation of contractors to a single tier of subcontractors is not practicable for large contracts and may require significant additional contracting and contract administration capability in contingency operations where these resources are most scarce. It may also result in prime contractors attempting to do more work themselves, regardless of cost or other efficiencies, to maintain a single subcontracting tier.



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APPENDIX G. URGENT/RAPID PROGRAMS, ORGANIZATIONS, AND FUNDS IN THE DOD



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APPENDIX H. FRAUD INDICATORS AND POOR PRACTICES IN RELATION TO THE CONTRACTING PROCESS (DODIG, 2010)

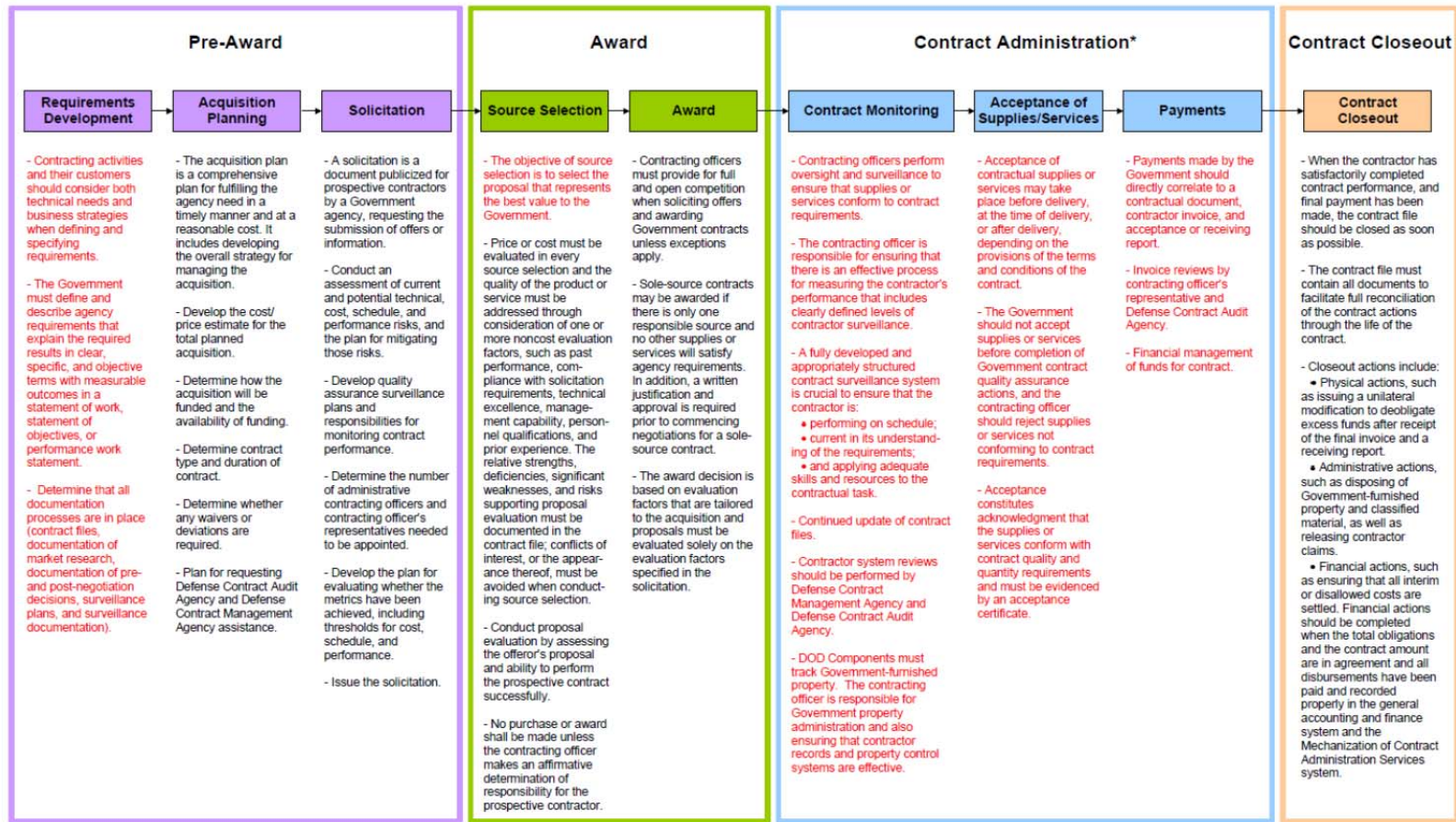
Pre-Award			Award		Contract Administration				
Requirements	Contract Documentation	Contract Type	Source Selection	Contract Pricing	Oversight and Surveillance	Inherently Governmental	Property Accountability	Award Fee	Financial Management
<ul style="list-style-type: none"> - The Government failing to state requirements functionally to The maximum extent possible. Specifications that are vague make it difficult to reasonable compare estimates. - The Government defining statements of work and specifications to fit products or capabilities of a single contractor, which effectively excludes competition. - The Government splitting requirements to use simplified acquisition procedures in order to avoid review and approval. - The Government modifying the contract shortly after award in order to make material changes in the requirements or statement of work. 	<ul style="list-style-type: none"> - A patterns of missing documents or documentation with outdated information in the contract file. - Contract documents that are altered, backdated, or modified to cover deficiencies. - Contract awards made without adequate documentation of all pre-award and award actions. - Invoices that do not have adequate supporting documentation or supporting documentation is incomplete. 	<ul style="list-style-type: none"> - The high risk to the Government in cost-reimbursement contracts may provide an opportunity for fraud to occur. - The contracting officer extending the duration of a cost-reimbursement or time-and-materials contract after experience provided a basis for firmer or fixed pricing. 	<ul style="list-style-type: none"> - Improper relationships with Government and contractor personnel. - The Government's failure to perform market research to determine evaluation factors, contracting method, or whether commercial items or nondevelopmental items would meet the Government's needs. - The Government restricting procurement to exclude or hamper any qualified contractor. - The Government revealing information about procurements to one contractor that is not revealed to another. - The Government accepting late or nonresponsive proposals, or accepting proposals from nonresponsible offerors. - The Government improperly disqualifying offerors. 	<ul style="list-style-type: none"> - The Government not preparing estimates or preparing estimates after negotiations are requested. - The Government and contractor utilizing unqualified personnel to develop cost or pricing data used in estimates. - Government estimates and contract award prices are consistently very close. - The Government approves items that are of lesser value but the contract cost is not reduced. - The contractor issuing an engineering change proposal soon after the award of a contract. 	<ul style="list-style-type: none"> - Contractors awarding subcontracts to unsuccessful bidders. - The Government providing materials or services to contractors even though contractors are being paid to provide the materials or services. - The administrative contracting officer approving modifications. - Contractors failing to meet terms but no compliance efforts are undertaken. - The Government certifying receipt of goods without performing inspections. - The user frequently complaining of poor quality of supplies or services provided under a contract. This may indicate that contractors are delivering something less than what you are paying for. - The Government failing to appropriately close out the contracts in a timely manner 	<ul style="list-style-type: none"> - Increased workloads and responsibilities that prohibit ongoing DOD monitoring of each contractor's work. - Contractors certifying payments for vendor goods, services, or salaries. 	<ul style="list-style-type: none"> - Inadequate management oversight and physical inventory control. - Unreliable property inventory data. - Inventory records disclosure unusual patterns when compared to physical inventory reviews that cannot be reasonably explained. - Inventory items marked with incorrect disposal condition codes, such as repairable or scrap when they should be labeled excellent. - Failure to return Government-furnished equipment. 	<ul style="list-style-type: none"> - Failure to properly document contractor performance. - The fee determining official's failure to properly document award fee determinations that different from Award Fee Review Board recommendations. - Award fee granted is not reflective of the contract oversight and surveillance assessments. 	<ul style="list-style-type: none"> - The contractor submitting false invoices or claims to the Government. - Excess profits on either a specific contract, product line, or division may be a billing fraud indicator. - Later contractor billings showing a downward adjustment in material costs as labor/overhead costs increase. - The Government paying contractors twice for the same items or services without an attempt to recoup the overpayments. - The Government not regularly reconciling contract payments, daily transactions, and inventory. - Contractor's failure to correct known system deficiencies. - Contractors or suppliers complaining that they are not being paid in a timely manner. This may indicate fraudulent manipulations and diversion of Government supply or finance operations. - The Government's failure to deobligate funds.



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APPENDIX I. KEY ASPECTS OF THE CONTRACTING PROCESS



Red Text = Top five recurring contracting issue areas.

* There are 70 contract administration functions in the Federal Acquisition Regulation.

(DoDIG, 2010)



ACQUISITION RESEARCH PROGRAM
GRADUATE SCHOOL OF BUSINESS & PUBLIC POLICY
NAVAL POSTGRADUATE SCHOOL

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APPENDIX J. CONTRACTING PROBLEM AREAS BY AUDIT REPORT (DODIG, 2012)

	Requirements			Contract Documentation	Contract Type		Source Selection	Contract Pricing	Oversight and Surveillance							Contractor Personnel			Property Accountability	Financial Management			
Report #s	Unclear/Changing	Out of Scope	Policy and Training Requirements		Cost Type	Time-and-Material	Commercial Acquisition			Program Office	Contracting Officer	COFs	DCMA	Written Procedures	Insufficient Staff	Training and Certification	Inherently Governmental Functions	Organizational Conflicts of Interest	Personal Services		Billing and Payments	Potential ADA	Funds/ Obligations
D-2010-051													x										
D-2010-052			x								x					x							
D-2010-054								x	x		x						x		x				
D-2010-055																					x	x	
D-2010-064								x	x														
D-2010-066	x													x									
D-2010-068											x			x									
D-2010-073																						x	x
D-2010-078						x					x	x					x						
D-2010-081						x			x		x						x				x		
D-2010-085											x		x										
D-2010-087					x				x		x											x	
D-2010-088									x		x		x							x			
D-2010-091	x						x				x		x							x			
D-2011-030										x			x				x						
D-2011-032		x									x							x					
D-2011-036					x			x														x	
D-2011-043								x	x		x											x	
D-2011-047									x		x			x						x	x	x	
D-2011-049							x										x						
D-2011-061									x				x	x								x	
D-2011-066														x									
D-2011-078	x								x		x									x			
D-2011-080																							
D-2011-081						x											x	x			x	x	x
D-2011-088										x		x	x				x						
D-2011-095														x	x								
D-2011-102																						x	
D-2011-105								x	x														
D-2011-113									x		x			x								x	
DODIG-2012-023																						x	
DODIG-2012-028	x											x								x			x
SPO-2010-002																					x		
SPO-2011-001															x	x					x		
SPO-2011-003																x	x				x		
SPO-2011-002			x																				
SPO-2011-007			x																			x	
SPO-2011-009	x	x	x																				
Total	5	2	4		1	4	3	5	10	2	14	3	7	7	3	3	6	2	1	8	8	9	3

(Note to Reader: We noticed an errors on the DODIG chart - Commercial Acquisition totals 3 not 2 reports, Source Selection totals 5 not 6, Potential ADA total 9 not 8.)

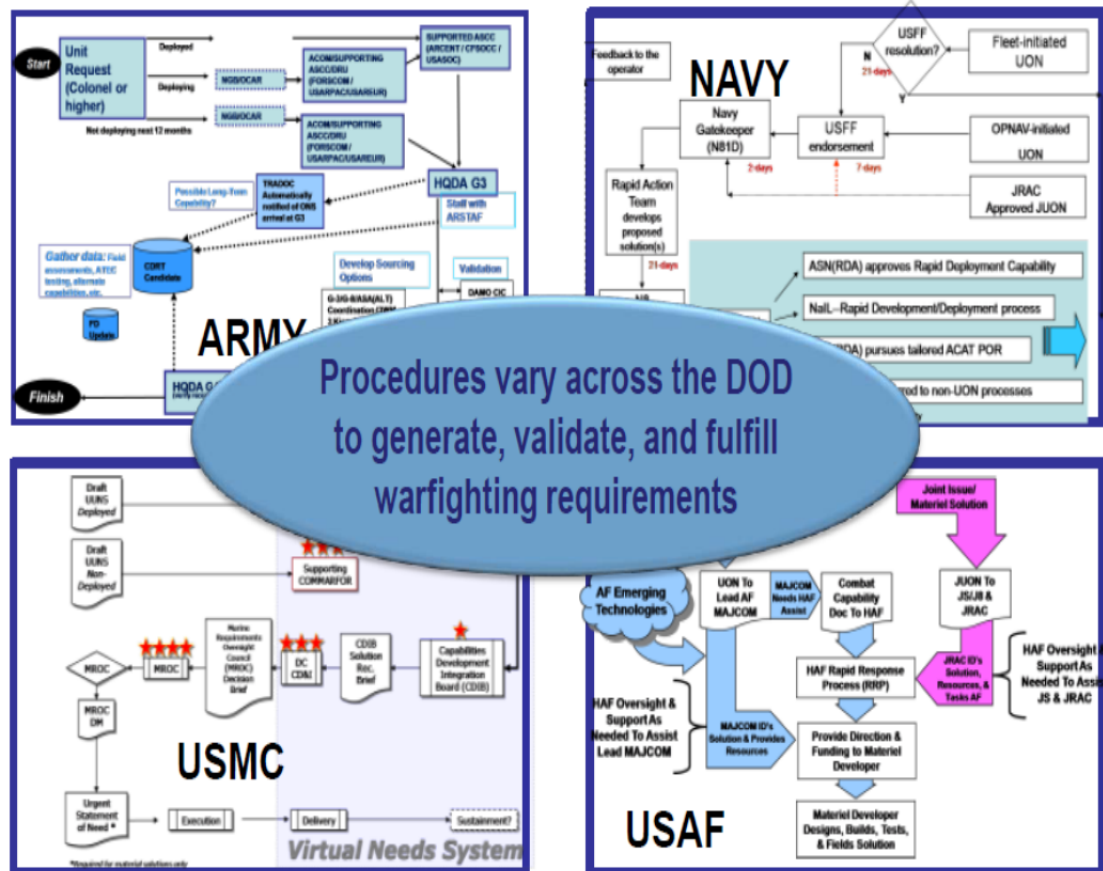
Taken from DODIG Report No. DODIG-2012-134 Contingency Contracting: A Framework for Reform 2012 Update, www.dodig.mil/Audit/reports/fy12/DODIG-2012-134.pdf



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APPENDIX K. EACH SERVICE NOW HAS AN URGENT NEEDS PROCESS



(Gansler, 2010)

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